Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

91-32

No. _____

In The

Supreme Court of the United States

October Term, 1990

SORBOTHANE, INC., BTR, INC.,
HAMILTON-KENT MANUFACTURING COMPANY,
and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN F. BOMSTER*
JOHN A. TARANTINO
W. JAMES MCKAY
ADLER POLLOCK & SHEEHAN
INCORPORATED
2300 Hospital Trust Tower
Providence, RI 02903
(401) 274-7200
Counsel for Petitioners

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

No. 1

Can a verdict of attempt to monopolize in violation of Section 2 of the Sherman Act be sustained when the jury has not been charged that it must find either specific intent or a dangerous probability of success?

No. 2

Can concerted activity between two wholly-owned subsidiaries of a common ultimate parent violate Section 1 of the Sherman Act?

No. 3

Can a verdict based on any antitrust violation under the Sherman Act be sustained when the jury has not been charged on the meaning of antitrust injury or the requirement under the law that before arriving at a verdict for the plaintiff it must identify such injury?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Ninth Circuit are those named in the caption of the case in this Court, as well as Spectrum Sports, Inc. ("Spectrum") and Kenneth B. Leighton ("Jr."), defendants/appellants below who have filed a separate Petition for a Writ of Certiorari. A listing of all parents and non-wholly-owned subsidiaries of Petitioners, as required by Rule 29.1, is attached as Appendix A at 1-2.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES IN THE COURT OF APPEALS ii

OPINION BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

I. The *Lessig* Rule, Which Allows for the Imposition of Liability for Attempted Monopolization Without Any Showing of Specific Intent or a Dangerous Probability of Success, Conflicts with the Decisions of Other Circuits and Disregards Decisions of This Court 6

II. The Failure of the Ninth Circuit to Apply *Copperweld* to the BTR Family of Wholly-Owned Companies Conflicts with and Disregards This Court's *Copperweld* Rationale and Conflicts with Decisions of Other Circuits 11

III. The Ninth Circuit Failed to Apply the Clear Direction From This Court in *Atlantic Richfield* That Antitrust Injury Must be Proved and Not Presumed 14

CONCLUSION 16

APPENDIX:

Page

Listing of parents and non-wholly-owned subsidiaries pursuant to Supreme Court Rule 29.1..App. 1

Ninth Circuit Decision dated July 3, 1990 .....App. 3

Modification of Ninth Circuit Decision dated April 1, 1991 .....App. 32

Decision of Southern District of California dated December 19, 1988 .....App. 34

TABLE OF AUTHORITIES

Page

CASES

Advanced Health-Care Serv., Inc. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990) 13

Agrashell, Inc. v. Hammons Products Co., 479 F.2d 269 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973) 10

Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984) 9

Am. Tobacco Co. v. U.S., 328 U.S. 781 (1946) 7

Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990) 8, 14, 15, 16, 17

Blanton v. Mobil Oil Corp., 721 F.2d 1207 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985)..... 10

Brown Shoe Co. v. U.S., 370 U.S. 294 (1962)..... 8

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 8

Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 441 (1990) 9

Consul, Ltd. v. Transco Energy Co., 805 F.2d 490 (4th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987) 9

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) ..... *passim*

Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) 9

Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606 (6th Cir. 1987)..... 14

TABLE OF AUTHORITIES – Continued

Page

E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) 10

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) 9

Gen'l Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987) 9

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) 9, 10

Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) 6

Greenwood Util. Comm. v. Miss. Power Co., 751 F.2d 1484 (5th Cir. 1985) 14

Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978) 9

Int'l Dist. Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987) 9

Int'l Tel. & Tel. Corp., 104 F.T.C. 280 (1984) 9

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951) 11, 12

Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980) .11, 12

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 6, 8, 9, 10, 16

Lorain Journal Co. v. U.S., 342 U.S. 143 (1951) 7

McGahee v. Northern Propane Gas Co., 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) 9

TABLE OF AUTHORITIES – Continued

Page

Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., Inc., 614 F.2d 832 (2d Cir. 1980) 9

Oahu Gas Serv., Inc. v. Pac. Resources, Inc., 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988) 8

Odishelidze v. Aetna Life & Cas. Co., 853 F.2d 21 (1st Cir. 1988) 14

Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) 9

Swift & Co. v. U.S., 196 U.S. 375 (1905) 7

U.S. v. Am. Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985) 9

U.S. v. Dairymen, Inc., 660 F.2d 192 (6th Cir. 1981) 9

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) 7, 8

STATUTES AND RULES

15 U.S.C. § 1 3

15 U.S C. § 2 3

15 U.S.C. § 15 ..... 2, 4

18 U.S.C. § 1964 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101 2

TABLE OF AUTHORITIES – Continued

Page

TREATISES AND LAW JOURNALS

III P. Areeda & D. Turner, *Antitrust Law*, ¶832, ¶833, ¶835a (1978) 10

M. Handler & R. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125 (1980) 10

B. Hawk, *Attempts to Monopolize – Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121 (1973) 10

D. Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L.J. 165 (1967) 10

No. _____

In The

Supreme Court of the United States

October Term, 1990

SORBOTHANE, INC., BTR, INC.,
HAMILTON-KENT MANUFACTURING COMPANY,
and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Sorbothane, Inc. ("Sorbothane"), BTR, Inc. ("BTR"), Hamilton-Kent Manufacturing Company ("H-K"), and Kenneth M. Leighton ("Sr.") (hereinafter collectively referred to as "SI" unless the context requires otherwise) respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth

Circuit") dated July 3, 1990, and as modified by the Ninth Circuit on April 1, 1991, Appendix A, 3-33 hereto.[1]

OPINION BELOW

The opinions of the Ninth Circuit are unreported memoranda decisions and are attached as Appendix A at 3-33.

JURISDICTION

The judgment of the Ninth Circuit initially was entered on July 3, 1990. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied by order of April 1, 1991.

This Petition for a Writ of Certiorari is filed under Section 2101 of Title 28 of the United States Code within ninety days of denial of SI's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the trial court was based upon 15 U.S.C. § 15.[2]

---

[1] The unreported opinion of the United States District Court for the Southern District of California ("trial court") on post-trial motions appears as Appendix A (34-43) hereto.

[2] Jurisdiction in the trial court was also based upon 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organizations Act (RICO). The opinion of the Ninth Circuit, however,

(Continued on following page)

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any one person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(Continued from previous page)

did not address the RICO claims and judgment below, and rested solely on an analysis of the antitrust claims brought against SI.

3. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Respondents, Shirley McQuillan and Larry McQuillan, individually and d/b/a Sorboturf Enterprises (collectively "McQuillan"), formerly distributed Sorbothane® athletic products made of Sorbothane®, a patented product, and produced at various relevant times by H-K and then Sorbothane. McQuillan sued SI, Jr. and Spectrum (hereinafter where appropriate Jr. and Spectrum are collectively referred to as "Spectrum") after Shirley McQuillan's services were terminated by Sorbothane. McQuillan asserted claims under federal and state antitrust laws, RICO, breach of contract, fraud, unfair competition, bad faith denial of existence of contract and conversion.

SI, without success, proposed jury instructions, or challenged those given by the trial court, on 1) dangerous probability of success; 2) intra-corporate activity under the teaching of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 (1984); and 3) antitrust injury. The jury found against SI on all counts.

The jury found BTR liable solely on the theory that two of its wholly-owned affiliates, H-K and Sorbothane,

were so closely managed and supervised by BTR that they were its alter ego. No individual wrongdoing by BTR was asserted or claimed to be shown at trial.

The jury found for Spectrum and Jr. on McQuillan's claims under Section 1 of the Sherman Act, however, leaving as the only conspiracy parties affiliated corporations.[3]

Spectrum and Jr. were found liable under provisions of Section 2 of the Sherman Act.

The jury awarded $1,743,000 on each of the claims on which SI and Spectrum were found liable. The trial court then denied post-trial motions for new trial and judgment notwithstanding the verdict ("JNOV") and entered judgment in the amount of $5,229,000 (compensatory damages trebled) together with attorneys' fees and costs.[4]

SI appealed from the jury verdicts and challenged various trial court rulings including instructions given or

---

[3] The opinions of the Ninth Circuit conceded that the evidence showed that SI and Leyland and Birmingham ("Leyland") were both licensed to manufacture and sell the subject patented product, Sorbothane®, by a BTR family member holding the license and were corporations existing under a family of companies ultimately owned and controlled by BTR, plc. (Appendix A at 13). However, the Ninth Circuit opinion determined that *Copperweld* was inapplicable based on its view that "the evidence was to the effect that both corporations operated autonomously," and held themselves out as competitors (*id.*).

[4] The fee award was the subject of a cross-appeal which was denied by the Ninth Circuit. There is currently pending before the Ninth Circuit McQuillan's request for attorneys' fees on appeal.

denied by the trial court and the denial of motions for new trial, directed verdict and JNOV.

REASONS FOR GRANTING THE WRIT

I. THE *LESSIG* RULE, WHICH ALLOWS FOR THE IMPOSITION OF LIABILITY FOR ATTEMPTED MONOPOLIZATION WITHOUT ANY SHOWING OF SPECIFIC INTENT OR A DANGEROUS PROBABILITY OF SUCCESS, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND DISREGARDS DECISIONS OF THIS COURT.

The Ninth Circuit's affirmance of the trial court as it related to the Section 2 attempt to monopolize claim can only be rationalized with the assumed validity of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).[5] The Ninth Circuit held that McQuillan need not prove the "dangerous probability of success" element of the Section 2 offense.[6] Instead, the Ninth

---

[5] Should the Section 1 claim against SI be vacated under the *Copperweld* argument, then the Section 2 claim must fall without regard to the validity of *Lessig*. This is true because *Lessig*, as applied by the Ninth Circuit, only allows the inferences of specific intent and a dangerous probability upon proof of predatory conduct as shown by a *per se* violation of Section 1. *See, e.g., Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979). In the present context, and on the present proof and charge, without a Section 1 violation, there is no factual basis for a Section 2 violation.

[6] Specifically, SI objected to that portion of the attempt to monopolize charge which stated: "If plaintiff has shown that defendants engaged in predatory conduct you may infer from

(Continued on following page)

Circuit maintains that "dangerous probability" may be inferred from evidence of proof of specific intent to monopolize, which in turn may be inferred from evidence of predatory conduct. This holding, which has been applied in the Ninth Circuit repeatedly since 1964, is directly at odds with this Court's consistent holding that dangerous probability of achieving monopoly power is a necessary element of proof in any attempted monopoly claim. *See Lorain Journal Co. v. U.S.*, 342 U.S. 143, 153 (1951); *Am. Tobacco Co. v. U.S.*, 328 U.S. 781, 785 (1946); *Swift & Co. v. U.S.*, 196 U.S. 375, 396 (1905).

The most definitive rejection of a *Lessig*-type rationale was made by this Court in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) where the Court stated:

> To establish monopolization or attempt to monopolize a part of trade or commerce under Section 2 of the Sherman Act, it [is] necessary to appraise the exclusionary power . . . in terms of the relevant market where the product is

---

(Continued from previous page)

that evidence the specific intent and the dangerous probability elements of the offense, without any proof of the relevant market of the defendant's market power." This objection was repeatedly raised and preserved in the trial court. Initially, the Ninth Circuit overlooked the preservation of this objection and chided trial counsel for not objecting to a *Lessig* charge. It then relied on its mistaken belief that no objection had been made or preserved as its rationale for not considering the vitality or demise of *Lessig*. When confronted on petition for rehearing with SI's demonstration that its counsel had objected to the *Lessig* charge, the Ninth Circuit corrected its Memorandum Decision to reflect this fact, and without comment clung to *Lessig*.

> involved. Without a definition of that market, there is no way to measure . . . ability to lessen or destroy competition.

Id. at 177.

Walker reaffirms that the fundamental purpose of the antitrust laws is to protect competition, rather than competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962). Here, as the Ninth Circuit conceded, there was no proof by McQuillan of any dangerous probability of success. Yet, *Lessig* relieved McQuillan from that burden at trial, thus acting squarely against the decisions of this Court and the fundamental purpose of the antitrust laws.

The *Lessig* rule is also inconsistent with the clear mandate in *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990), that an antitrust injury must be proved. By cutting out the need for any proof of the market in which the alleged anticompetitive threat exists, *Lessig* effectively grants to competitors a presumption of injury. However, logic dictates the flaw: without knowledge of the relevant market, much less a defendant's power in that market, proof of anticompetitive conduct alone will not at law support an inference of antitrust injury as required by *Atlantic Richfield*.

In sum, *Lessig's* presumption, if left standing, effectively writes the intent and dangerous probability of success elements out of Ninth Circuit antitrust law.[7]

---

[7] *Lessig* deprives the antitrust defendant of the affirmative presumption of *Oahu Gas Serv., Inc. v. Pac. Resources, Inc.*, 838

(Continued on following page)

Lessig is also squarely in conflict with the law of every other Circuit that has addressed the issue: each has affirmed and reaffirmed that a showing of dangerous probability in a relevant market is essential to establish attempted monopoly claims.[8] Several of these Circuits have also expressly declined to follow, or have rejected, *Lessig*,[9] and *Lessig* has been severely and soundly

---

(Continued from previous page)

F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988), that if there is a concurrent non-antitrust motivation for the termination, then an antitrust motive should not be presumed. *Id.* at 368-69.

[8] *See, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 693 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 441 (1990); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989); *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494 n.9 (4th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987); *Gen'l Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 525-26 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *U.S. v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., Inc.*, 614 F.2d 832, 841 (2d Cir. 1980); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1096 (3d Cir. 1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Int'l Tel. & Tel. Corp.*, 104 F.T.C. 280, 408 (1984).

[9] *See, e.g., Int'l. Dist. Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 790 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987); *Consul*, 805 F.2d at 494 n.9; *U.S. v. Am. Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985); *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1366-67 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-12 (7th Cir. 1979), *cert. denied*, 445 U.S.

(Continued on following page)

criticized by the commentators.[10] Indeed, one panel of the Ninth Circuit acknowledged the criticism, yet held to the *Lessig* doctrine, apparently permitting *stare decisis*, rather than logic, to carry the day. *See Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1214 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985).

The antitrust laws were not designed to be a panacea to deal with all possible claims of unfair conduct. Rather, the antitrust laws were designed by Congress to project competition. *Lessig* transforms the antitrust laws into super-unfair trade practices acts because it strips the antitrust laws, and the attempted monopoly power doctrine, of their true antitrust objectives. Because *Lessig* disregards the statute and this Court's rulings, and because it conflicts with the decisions of other Circuits, the Writ of Certiorari should be granted finally to end *Lessig's* twenty-seven-year reign of error in the Ninth Circuit.

(Continued from previous page)

917 (1980); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *George R. Whitten*, 508 F.2d at 550; *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 287 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).

[10] *See* III P. Areeda & D. Turner, *Antitrust Law*, ¶832 at 336-39, ¶833 at 339-43, ¶835a at 346 (1978); M. Handler & R. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 153-55 (1980); B. Hawk, *Attempts to Monopolize – Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1152 n.147 (1973); D. Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L.J. 165, 171 (1967).

II. THE FAILURE OF THE NINTH CIRCUIT TO APPLY *COPPERWELD* TO THE BTR FAMILY OF WHOLLY-OWNED COMPANIES CONFLICTS WITH AND DISREGARDS THIS COURT'S *COPPERWELD* RATIONALE AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit sustained the antitrust jury verdict on Section 1 of the Sherman Act predicated on a supposed plurality created by a concert of action between two corporations wholly owned by the same parent. Relying on two pre-*Copperweld* decisions, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951) and *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980), the Ninth Circuit concluded that companies under common ownership and control can conspire to violate Section 1 of the Sherman Act if they hold themselves out as competitors, and identified what it claimed constituted factual support for the conclusion that Leyland and Sorbothane, the BTR affiliates, met this test.

The Ninth Circuit then approved the trial court's instruction which it viewed as "along the lines of *Las Vegas Sun*" rejecting SI's claim that the trial court erred by failing to give a proper *Copperweld* instruction.[11] Appendix A at 13-14.

---

[11] SI argued at directed verdict that, as a matter of law, the affiliated corporations could not form a plurality of action. The trial court rejected this analysis of *Copperweld* and, instead, gave the following fact-based jury instruction which was approved by the Ninth Circuit:

> A conspiracy between affiliated corporations may be found to exist unless the affiliated corporations are functioning as a single economic enterprise. The

(Continued on following page)

The Ninth Circuit's analysis, based on *Kiefer-Stewart* and *Las Vegas Sun* is incorrect and contrary to this Court's holding in *Copperweld*. The very language that the Ninth Circuit cited from *Kiefer-Stewart* was criticized by the *Copperweld* Court as being short on analysis and as failing "to confront the anomalies an intra-enterprise doctrine entails." *Copperweld*, 457 U.S. at 764. The *Copperweld* Court specifically criticized the *Las Vegas Sun* "single entity" test that the trial court included in its charge because the factors used in that test are insufficient to describe a separate economic entity for purposes of the Sherman Act. Rather, those factors simply describe the manner in which a parent chooses to structure a sub-unit of itself. Regardless of how the parent chooses to structure a sub-unit of itself, however, the controlling fact, as *Copperweld* teaches, is whether the ultimate interest of the subsidiary

---

(Continued from previous page)

defendants have the burden of establishing that all members of the alleged conspiracy function as a single economic enterprise. To determine whether affiliated corporations function as a single economic enterprise, the jury must examine the particular facts of the case before it in accordance with various criteria. Among the criteria which may be examined when determining whether affiliated corporations function as a single economic enterprise are: (1) whether they have separate control of their day-to-day operations; (2) whether they hold themselves out as competitors; (3) whether they have separate officers; (4) whether they have separate corporate headquarters; and (5) whether they have common investors or owners. To find affiliated corporations to be a single economic enterprise, the jury must find a complete unity of interest between them.

and the parent are identical. If so, the parent and subsidiary must be viewed as a single economic unit. *Copperweld* 457 U.S. at 772 n.18.

Here, the interests of two corporations ultimately wholly owned by the same parent, (and the interests of the parent) are also identical, so the entities must also be "viewed as a single economic unit." The *Copperweld* Court recognized that "the economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition." *Id.* at 772.

Under *Copperweld*, the alleged "division of markets" between Leyland and Sorbothane (which in the Ninth Circuit's view supported the Section 1 claim) would not violate Section 1 if Leyland and Sorbothane were operated as divisions of one parent. Yet, the decision of the ultimate parent, BTR plc, to establish separate corporations (Sorbothane and Leyland) rather than divisions (for economic, legal or other considerations) does not remove Leyland and Sorbothane from *Copperweld's* analysis and rationale. *Id.* at 772-73. The Ninth Circuit holding to the contrary was erroneous and should be reversed since the sole basis for Section 1 liability rested on the Ninth Circuit's rejection of *Copperweld* reasoning in this case.

At least four Circuit Courts, contrary to the Ninth Circuit, have held that the reasoning of *Copperweld* is not to be limited to a narrow parent-subsidiary fact pattern. *See Advanced Health-Care Serv., Inc. v. Radford Community*

Hosp., 910 F.2d 139, 146 (4th Cir. 1990); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987); *Greenwood Util. Comm. v. Miss. Power Co.*, 751 F.2d 1484, 1496 (5th Cir. 1985). Those courts recognize that economic substance, as opposed to legal form, is the basis of *Copperweld*. The Ninth Circuit's contrary view thus creates a split in the Circuits of substantial and recurrent import which should be resolved by this Court.

III. THE NINTH CIRCUIT FAILED TO APPLY THE CLEAR DIRECTION FROM THIS COURT IN ATLANTIC RICHFIELD THAT ANTITRUST INJURY MUST BE PROVED AND NOT PRESUMED.

In *Atlantic Richfield*, this Court reversed a Ninth Circuit decision, and held that even if injury to competition is presumed from a *per se* violation of the Sherman Act, the individual plaintiff seeking damages and relief *must*, if it is to have standing to sue, additionally prove that it suffered "antitrust injury."[12] The plaintiff must be injured

---

[12] In SI's Petition for Rehearing and Suggestion for Rehearing *En Banc*, SI directed the attention of the Ninth Circuit to the *Atlantic Richfield* case which was decided after oral argument but before the Ninth Circuit initially affirmed the trial court. The jury here was not instructed that "antitrust injury" was required to be proved even though SI specifically requested such an instruction and objected to its omission when the trial court refused SI's request. The Ninth Circuit decision was directly contrary to *Atlantic Richfield* in this regard; but it refused to grant rehearing or to correct its error.

"by reason of" the antitrust violation and the injury suffered must be an *injury to competition*. As this Court stated, "[the] antitrust injury requirement insures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason." 110 S.Ct. at 1894 (emphasis in original).

Here, because the trial court refused to grant SI's charge,[13] the jury was not instructed that McQuillan had to prove "antitrust injury". Despite this reversible error on the part of the trial court, the Ninth Circuit did not even mention, let alone respond to, the express call to its attention of *Atlantic Richfield*. It simply affirmed.

The Ninth Circuit's failure to apply *Atlantic Richfield* is particularly egregious where, as here, absent an antitrust injury charge, there is no way to determine whether the jury made a determination that because McQuillan may have been "harmed" in some way (*i.e.*, she lost her ability to distribute Sorbothane® products) that in turn her injury *must* have been caused by some anticompetitive conduct.[14] All that can be determined is that the

---

[13] For each of the substantive antitrust offenses, SI requested a charge that an element of the claim which must be shown by the plaintiff was antitrust injury. This request was denied for each of the antitrust claims presented to the jury.

[14] Indeed, logic precludes such an assumption since the jury was not given a definition of "antitrust injury" and was not charged that its finding was required to establish liability.

jury found she was injured. For antitrust purposes, that is simply not enough. The error is further compounded when one considers the attenuated chain of inferences under the Section 2 claim allowed by *Lessig* which effectively precludes the need for any showing of injury to competition.

Atlantic Richfield is clear; it requires proof of "antitrust injury". Here not only was proof of antitrust injury lacking, but the jury was not instructed on the meaning of "antitrust injury" and was not charged that, for McQuillan to prevail, it must find "antitrust injury."

CONCLUSION

It is important and timely that this Court address the issues raised by this Petition and rid the Ninth Circuit courts of the *Lessig* rule. *Lessig* has been rejected by courts and the commentators repeatedly, universally and soundly. *Lessig* subjects those doing business within the geographic boundaries of the Ninth Circuit to unfair and radically different applications of the federal antitrust laws from the rest of the nation. *Lessig* negates the causality requirement that is required by this Court to impose antitrust liability. For years the *Lessig* rule has resulted in, and caused, excessive and unnecessary litigation and a vast amount of confusion in the courts and business community. *Lessig* here, and in many other cases, has led, leads and will continue to lead to unjust results unless corrected.

The application of *Copperweld* to subsidiaries of a common parent should be expressly confirmed so that the

conduct of businesses, which operate in a variety of legal forms, will be analyzed by the sound rationale that flows from attention to substance. *Copperweld* does not teach corporate form or encourage mega-subsidiaries as a means of falling within its analysis. Rather, the antitrust laws were not meant to reach, on conspiracy claims, wholly-owned affiliated corporations, just as they were not meant to reach parents-subsidiaries.

Finally, *Atlantic Richfield* is the law of the land. That law was ignored by the Ninth Circuit. Antitrust injury is required to be *proved*. No injury is presumed even in the case of a *per se* violation. The Ninth Circuit failed to apply the *Atlantic Richfield* rationale once and was reversed by this Court. This Court should once again reverse the Ninth Circuit making clear that this Court's decisions must be followed.

Dated June 28, 1991.

Respectfully submitted,

JOHN F. BOMSTER
JOHN A. TARANTINO
W. JAMES MCKAY
ADLER POLLOCK & SHEEHAN
INCORPORATED
2300 Hospital Trust Tower
Providence, RI 02903
(401) 274-7200

Counsel for Petitioners

APPENDIX

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

1. Parents of Hamilton-Kent Manufacturing Company, Inc. and Sorbothane, Inc.

Both are wholly-owned subsidiaries of BTR (DHC) Inc., which is in turn wholly owned by BTR, Inc.

2. Parents of BTR, Inc.

BTR, Inc. is a wholly-owned subsidiary of BTR Dunlop Inc., which in turn is wholly owned by BTR Dunlop Holdings, Inc., which in turn is wholly owned by BTR International Limited, a wholly-owned subsidiary of BTR plc.

3. Non-Wholly-Owned Subsidiaries of Hamilton-Kent Manufacturing Company, Inc. and Sorbothane, Inc.

There are no subsidiaries for these companies.

4. Non-Wholly-Owned Subsidiaries of BTR, Inc.

The following companies are indirect subsidiaries of BTR, Inc. and are not wholly owned by BTR, Inc. or its wholly-owned subsidiaries.

A. BTR Brazil Ltda.

B. Huyck Australia Pty. Ltd. – BTR Gas Measurement Pty. Ltd. – Australian Meter Manufacturers Pty. Ltd.

C. Wadco Tools Ltd. (India)

D. Valvulas Worcester de Argentina S.A.

E. Valvulas Worcester do Brazil Ltda.

F. Audco Sulamericana Ltda.

G. Dunlop Automotive Composites, Inc.

H. Permoica S.A.

I. Zamif Schlegel Co., Ltd. (Saudi Arabia)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY McQUILLAN, *et al.*, Plaintiffs/Appellees/ Cross-Appellants, vs. SORBOTHANE, INC., *et al.*, Defendants/Appellants/ Cross-Appellees.	)	Case No. 89-55326 89-55329 89-55332 DC #CV-84- 1585-E MEMOR- ANDUM* (Filed July 3, 1990)

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge, Presiding

Argued and Submitted April 13, 1990
Pasadena, California

Before: TANG and O'SCANNLAIN, Circuit Judges, and MARQUEZ, District Judge.**

This is an action brought by Shirley McQuillan and Larry McQuillan, individually and dba Sorboturf Enterprises (McQuillan) against the defendants BTR, Inc.,

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

Hamilton-Kent Manufacturing Company (H-K), Sorbothane, Inc. formerly Sorbo, Inc., Kenneth M. Leighton, Sr., Spectrum Sports, Inc. and Kenneth B. Leighton, Jr. Claims were asserted under federal and state antitrust laws, RICO, breach of contract, fraud, unfair competition, bad faith denial of existence of a contract, and conversion.

The jury, after a lengthy trial, found against the defendants BTR, Inc., H-K, Sorbothane, Inc. and Leighton, Sr. on all Counts. Spectrum and Leighton, Jr. were found liable on the claims for unfair competition (Section 17200 California Business and Professions Code), interference with prospective business advantage, violation of Section 2 of the Sherman Act, and violations of the RICO Act, 18 U.S.C. §1962(b), (c), and (d). The jury found that H-K was the agent or alter ego of BTR, Inc.

The jury assessed $1,743,000 in each of the claims on which the defendants were found liable. The District Court entered judgment in the sum of $5,243,000 (compensatory damages trebled), together with reasonable attorneys fees and costs.

McQuillan moved for attorneys fees under the state and federal antitrust laws and the RICO laws. The application sought fees of $1,759,969, reflecting 9,008.4 hours at a rate of $130.94 per hour. McQuillan additionally sought an enhancement for delay of $137,358, and an enhancement of 33% ($436,684) for the risk of non-payment, for total enhancement of $574,042.00 which the Court denied. The Court awarded the sum of $912,032.50 for attorneys fees. Defendant/Appellants appeal from the jury verdicts and challenge certain trial court rulings

relating to the testimony of the plaintiffs' expert, a Motion in Limine granted by the Court, denial of Motions for A New Trial, Directed Verdict, and JNOV, and certain instructions given by the Court.

McQuillan appeals the District Court's denial of the request for enhancement of attorneys fees.

FACTS AND PROCEEDINGS BELOW

Conflicts in the evidence have been resolved in favor of the party who prevailed on a particular claim.

Sorbothane is a viscous elastic polymer invented by Dr. Maurice Hiles in England. It is a solid that absorbs energy like a liquid. Dr. Hiles' work on Sorbothane was funded by British Technology Group [BTG].

BTR, Inc. [BTR], a Delaware corporation, is a holding company which at all relevant times owned, directly or indirectly, H-K and Sorbothane, Inc. [S.I.]. Up to May 1982, S.I. was the Sorbo Division of H-K.

In 1982 S.I. was formed to take over H-K's Sorbothane business.

Spectrum Sports, Inc. [Spectrum] is an Ohio corporation, formerly Ohio Cushions, Inc., and is owned by Kenneth B. Leighton [Jr.] and Michael Silvestro.

Kenneth M. Leighton, Sr. [Sr.] is Jr.'s father. He served as President of H-K and S.I. at all relevant times. He became interested in Sorbothane and in August 1980 an unrestricted license to manufacture and sell Sorbothane "in all world markets" was granted to H-K by B.T.R. Development Services Ltd.

At all times material herein John Cahill was President of BTR, Chairman of H-K, and possibly a Director of H-K. He was also a member of the Board of S.I.

A United Kingdom Company, Birmingham and Leyland [Leyland], was also licensed to manufacture and sell Sorbothane without territorial restrictions.

In 1980, Dr. Hiles was hired as a consultant to H-K in the United States.

When Shirley McQuillan read a magazine article in the spring of 1980 about the shock absorbent qualities of Sorbothane, she thought it might work as a horseshoe pad. McQuillan, along with acquaintance Alby Jardine, contacted Dr. Hiles in England. The McQuillans and the Jardines formed a company called Safe and Sound as a base to develop Sorbothane equestrian products.

Jr. was then President of Marketing for H-K. McQuillan presented to H-K a letter of intent regarding their prospective business relationship. The letter of intent, signed by Sr., President of H-K, anticipated a definitive agreement granting Safe and Sound the exclusive right to purchase Sorbothane for resale as equestrian products.

In the summer of 1981, McQuillan resigned from Safe and Sound. She and her husband Larry formed a company called Sorboturf for their Sorbothane development. While McQuillan was developing a Sorbothane horseshoe pad, H-K was attempting to develop a national market for other Sorbothane products, including athletic shoe inserts and medical products.

Sr., along with H-K's marketing manager Laurene Heinsohn, decided to use regional distributors. In December 1982 Heinsohn left S.I. and was employed by Spectrum Sports.

McQuillan and her company Sorboturf were selected as the distributor for the southwestern United States. Jr., at the time Vice President of marketing at H-K, decided that he too wanted to be a distributor. In addition to Sorboturf and Jr.'s company Spectrum Sports, the other distributors were Myron McCone (Shirley McQuillan's father) and his company RHR, Inc., Triad Research (Marty Vogel), and Absorbotech (Arnie Lund). The distributorships were established by early August, 1981.

On September 15, 1981, H-K sent to McQuillan a letter enclosing a price list. Sorboturf thereafter began buying and distributing Sorbothane products. Shortly after Sorboturf began distributing Sorbothane in the fall of 1981, McQuillan received from H-K a draft contract. H-K's proposed contract suggested that either party could terminate upon sixty days notice. McQuillan protested that she would not invest substantial time and money in developing the Sorbothane market if H-K could terminate her distributorship without cause.

H-K required its regional distributors to agree to fix wholesale and retail prices. Thus, McQuillan and each distributor were required to agree to sell to retailers at a fixed markup and further, to "police" the retailers to prevent discounting at the retail level. Heinsohn told the distributors that if they learned of retailers discounting the product, the offending retailer was to be cut-off.

Heinsohn warned the distributors that violating the pricing agreements would jeopardize their distributorships.

In January 1982, there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, had marketed Sorbothane in England. In late 1981, Burne had proposed becoming the national Sorbothane medical distributor in the United States. Heinsohn objected, pointing out that H-K had already committed the medical market to the regional distributors. By the time of the January, 1982 meeting, Sr. had appointed IEM as the national medical distributor.

McQuillan had always paid her H-K invoices within thirty days. In addition to meeting her obligations as an athletic distributor, McQuillan had continued to work diligently with Dr. Hiles to develop a marketable Sorbothane horseshoe pad.

In April 1982, Sr. called a meeting in Chicago with McQuillan, her father, and Heinsohn. Sr. told Heinsohn that the purpose of the meeting was to move McQuillan out of the athletic market by making her right to distribute equestrian products conditional upon the relinquishment of her athletic distributorship.

In May, 1982, McQuillan attended a meeting at the S.I. facility in Ohio. Attendees included Sr., Jr., Heinsohn, Dr. Hiles and John Forsyth, a Sorbo, Inc. engineer. As of May 1982, the Sorbothane business had been moved by BTR, Inc. from H-K to Sorbo, Inc. Heinsohn moved to Sorbo, Inc. as its marketing manager.

After the meeting, Heinsohn made it clear to McQuillan that McQuillan had to sell her athletic distributorship to Jr. to keep the equestrian distributorship rights. Heinsohn scheduled a meeting that afternoon with Jr. for McQuillan to discuss such a "sale." Jr. informed McQuillan at that meeting that she would either come to an agreement with him or she would be "looking for work."

In June 1982, S.I. announced that Intermark would be the new national distributor for the "box shoe trade;" shoe stores that carry a variety of shoes as opposed to simply athletic shoes. Heinsohn testified that the box shoe trade had been part of McQuillan's market.

In late summer or fall of 1982, Heinsohn became aware for the first time that S.I. had involved Dr. Kent Vasko of Sterivet, Inc. in the horseshoe pad project. At the conclusion of a distributor's meeting in the fall of 1982, Sr. casually informed McQuillan that " . . . we have appointed Sterivet as the national equestrian distributor, and you are no longer involved in equestrian products."

In November, 1982, Sr. presented his "last agreement" for an athletic distributorship with Sorboturf. This one, however, clearly permitted termination without cause. In response, McQuillan submitted her own contract that permitted termination only for cause.

In December 1982, Heinsohn, at Sr.'s direction, instructed Dr. Hiles and Forsyth to deliver test documentation and prototypes for the McQuillan horseshoe pad. In January 1983, S. I. began marketing the horseshoe pad. According to Dr. Hiles, the pad marketed by S.I. was

indistinguishable from the pad he and McQuillan had developed.

Although unwilling to sign McQuillan's proposed contract for Sorboturf's athletic distributorship, S.I. did not sever the relationship and continued to treat Sorboturf as a distributor.

On August 1, 1983, with no previous warning or explanation, S.I. notified McQuillan in writing that S.I. "would no longer accept Sorboturf's order." In August, 1983, McQuillan's father was also terminated as a distributor without explanation, warning or justification. Less than one month later, Sorboturf's customers received notice that Jr.'s company was now the national distributor.

After receiving the August 1, 1983, letter from S.I., McQuillan contacted Dr. Hiles about the possibility of continuing her distributorship using British manufactured Sorbothane. However, Dr. Hiles informed her that Leyland, the other manufacturer of Sorbothane, was unwilling to sell in the United States. Having no alternative source of Sorbothane, McQuillan's distributorship was destroyed.

Birmingham and Leyland, although not restricted from making sales in the United States under its license agreement, had entered into an agreement with H-K that it would not sell in the United States and Canada and H-K, in turn, would not sell in Europe.

There are two groups of defendants/appellants/cross-appellees. They are:

(1) Sorbothane, Inc. [S.I.], Hamilton-Kent, Inc. [H-K], BTR, Inc., and Sr. [S.I. Group]; and

(2) Spectrum Sports, Inc. and Jr. [Spectrum Group].

DISCUSSION

THE SHERMAN ACT SECTION 1 CLAIM

McQuillan claimed an agreement between S.I. and its competitor, Leyland, to allocate the world market for Sorbothane products. The Courts treat horizontal market division agreements as per se violations of the Sherman Act. In *United States v. Topco. Associates, Inc.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1134 (1972) The Supreme Court said:

> "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. . . . One of the classic examples of a per se violation of Section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g. manufacturers and distributors, which are termed 'vertical' restraints. This court has reiterated time and time again that 'horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' [Citations omitted.] Such limitations are per se violations of the Sherman Act."

An action under Section 1 of the Sherman Act requires proof of a contract, combination, or conspiracy in restraint of trade. 15 U.S.C. Section 1. The essence of a

Section 1 claim is concerted action. *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987). Heinsohn and Hiles testified that it was their understanding that there was an agreement by the two companies whereby Leyland would not export any Sorbo products into the United States and S.I. would not export products to Europe. Around October 1982 a United States company called Frelen U.S. was interested in obtaining Sorbothane products. Leyland informed Frelen U.S that they would supply the materials or parts. This prompted a telex from Heinsohn on behalf of S.I. to Leyland informing them that "the import of finished Sorbo parts to a U.S. customer is in direct opposition to a harmonious marketing relationship between our two companies." This resulted in a telex from a Leyland official to S.I. apologizing for any problems which may have been caused and asking that he be advised if we, Leyland, are guilty of any further infringements at any time.

S.I.'s argument is that Leyland and S.I. are sister corporations and they are incapable of conspiring under the holding of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772, 104 S.Ct. 2731, 2741-42 (1984). In *Copperweld* the Supreme Court held as a matter of law that a parent and its wholly-owned subsidiary are not distinct entities for the purpose of establishing the plurality requirement under a Section 1 claim. Since *Copperweld*, some circuits have held that not only wholly-owned subsidiaries and their parents are incapable of conspiring, but that sister subsidiaries are the same entity for purposes of an antitrust conspiracy under Section 1 and thereby do not satisfy the plurality element. The Ninth Circuit declined to reach this question as between sister

corporations in *Wilcox v. First Interstate Bank of Oregon, N.A., supra.* S.I. contends that the Court should have directed a verdict or granted JNOV because the jury found that neither Spectrum nor Jr. conspired under the antitrust laws, therefore the only possible conspirators are Leyland and S.I. and they are incapable of conspiring as a matter of law under *Copperweld.*

The District Court denied the Motion for a Directed Verdict and JNOV. While the evidence did show that S.I. and Leyland were licensed by a BTR family member and that they are corporations existing under a family of companies controlled by BTR, PLC, a U.K. Holding Company, the evidence was to the effect that both corporations operated autonomously. This was true of all of the corporations that were in the BTR family. John Cahill was a defense witness for S.I. He testified that there are about 650 units under the BTR family throughout the world. They are engaged in producing many different types of products and operate as independent units entirely autonomously. Hiles testified that some of the companies in the BTR family are strictly holding companies and some are operating companies. The operating companies operate as individual companies.

The Supreme Court has held that "common ownership and control does not liberate (two separately incorporated subsidiaries within the same corporate family) from the impact of the antitrust laws . . . especially . . . where (they) hold themselves out as competitors." *Kiefer-Stewart Co. v. Joseph E. Seagrams and Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 261 (1951). The Ninth Circuit has held that "to conspire within the meaning of the

Sherman Act, corporate entities within a single organization must be sufficiently independent of each other for the concerted action to raise antitrust concerns . . . to determine whether corporate entities are separate enough to be capable of a conspiracy, a Court must examine the particular facts of the case before it . . . if the intra-enterprise entities hold themselves out as competitors, the rule that they can not avoid Sherman Act liability by hiding behind a common ownership and control is "especially applicable." *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979). The District Court gave an instruction along the lines of *Las Vegas Sun, Inc.* The jury made a factual determination against S.I. on this issue.

A Motion for JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same as for a directed verdict. *Fountila v. Carter*, 571 F.2d 487, 489-90 (9th Cir. 1978). The Court considers "all of the evidence in the light most favorable to the non-moving party and draw(s) all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1423 (9th Cir. 1986). The Court properly denied S.I.'s Motions for JNOV and a Directed Verdict.

TESTIMONY OF McQUILLAN EXPERT

The District Court's evidentiary rulings will be upheld on appeal unless the court abused its discretion, *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984), *cert. denied* 469 U.S. 1165, 105 S.Ct. 926 (1985), or committed "manifest error." *United States v. Marabelles*, 724 F.2d 1374, 1381 (9th Cir. 1984). There is abuse of discretion if the lower Court decision is clearly erroneous or is based

on incorrect legal standards. *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). McQuillan elected to prove damages by showing a "loss of business value." The method of proving "loss of business value" was addressed by the Ninth Circuit in *Simpson v. Union Oil Company of California*, 411 F.2d 897 (9th Cir. 1969) as follows:

> "The issues should have been, what was the value of the business, what money did appellant have invested in it, what was its net income after deducting a fair return on capital and a fair compensation to appellant for his work, what were the prospects of continual renewals of the lease, and finally, if illegal restraints were removed, what were the prospects of additional profits from the business as it became better established. These are the factors that a willing buyer would consider in determining fair market value of the business . . . " 411 F.2d at 910.

James H. West, McQuillan's expert, testified as follows: He is a C.P.A., having been certified in 1952. He estimates that he has testified in Court as an expert on at least thirty occasions. He has experience in valuations of businesses since the early 1960's. This was in connection with valuing businesses being acquired or sold by clients, or on matters involving estate taxes in valuation of the business and estate plan, and after death valuations. He has also participated in matters involving disputes between parties on business-type valuations. He performed a valuation of Sorboturf Enterprises (McQuillan's business) as of the date of termination which was August 1, 1983. He explained that he considered sales for the period of existence of the business and made a forecast of sales for a future period. As he explained, in the case of a

business that has a short history but has a growing trend in terms of its sales volume, it is usually necessary to utilize a forecast method to determine what the longer-term earnings would be in that, in evaluation, the buyer is essentially buying an income, buying a share of earnings. It is thus necessary to forecast the possible earnings in the future. He also considered expenses and costs, both past and the future. He determined a value for the athletic and equestrian distributorships. He then reached a total value for the business and reduced it to a present value. In valuing the business as of August 1, 1983, he did not consider information available after that date. He correctly stated that the valuation has to be based upon data that is available at the time of termination. S.I. and Spectrum argue that his method of valuation was inconsistent with the manner in which "loss of business value" must be proven and was without foundation and therefore speculative. The testimony of West had been admitted subject to a Motion to Strike. The Court denied the Motion to Strike.

Mr. West's testimony was not inconsistent with the formula set forth by the Ninth Circuit in *Simpson, supra*. Most of the objections of S.I. and Spectrum go to the weight of the testimony. The Court did not abuse its discretion or commit manifest error in admitting the testimony of Mr. West and denying the Motion to Strike.

MOTION IN LIMINE

The trial court granted a Motion in Limine by McQuillan and as a result S.I. and Spectrum were not permitted to introduce evidence of events occurring after

August 1, 1983, as they related to the antitrust, RICO, and damage claims.

This ruling is appealed only by S.I., who maintains that post-termination evidence was relevant to show a lack of monopoly power, bears directly on the issue of specific intent to monopolize, and can also demonstrate the absence of injury in fact.

Evidentiary rulings are reviewed for abuse of discretion. The authorities cited by S.I. do not stand for the proposition that post-termination activity must always be admitted. The relevant time-period for demonstrated monopoly power is the period in which S.I. and Spectrum were engaging in the acts complained of by McQuillan, i.e. from the time she went into business until she was forced to close. The same is true of evidence of a declining marketshare in the relevant market and inability to exclude competitors. Evidence of the existence or non-existence of these elements after the termination date may be admissible depending on the circumstances of each case. It is important to note that the kind of damages which the plaintiff is claiming may effect whether or not such post-termination evidence is admitted. S.I. cites *Greyhound Computer Corporation v. IBM Corp.*, 559 F.2d 488, 496, n. 18 (9th Cir. 1977) in support of admissibility of post-termination activity. In that case the plaintiff was suing for loss of business and future profits. Future profits would be affected by post-termination activity. McQuillan sued for the "loss of business value." The only material evidence relates to the value of her business at the time that she was terminated by the defendants.

S.I. also contends that the Court's ruling denied them the opportunity to prove that there was no "threat of continuing activity" as required by RICO. S.I. cites *Sedima v. Imrex, Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985) as authority. In *Sedima* the Court said that there must be at least two acts and some evidence of a threat of continuing activity in order to find a pattern of racketeering activity. This language does not mean that post-termination activity is necessarily admissible in every case.

The trial court did not abuse its discretion in granting the Motion in Limine.

SHERMAN ACT – SECTION 2

(THE ATTEMPT TO MONOPOLIZE CLAIM)

The jury found against S.I. and Spectrum on the violation of Section 2 of the Sherman Act – monopolizing, attempting to monopolize, and conspiring to monopolize. The verdict form did not break down each of the claims, therefore, if the evidence is adequate to sustain any of the three theories, the verdict must be sustained. The Court instructed the jury that the plaintiff claimed that the defendants violated the Federal antitrust laws by monopolizing or attempting to monopolize the athletic shoe market insert, the polymer athletic shoe insert submarket, or the Sorbothane athletic shoe insert market. The jury was instructed that in order to prove the claim of attempted monopoly, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That the defendants had a specific intent to achieve monopoly power in the relevant market;

2. That the defendants engaged in exclusionary or restricted conduct in furtherance of its specific intent;

3. That there was a dangerous probability that defendants could sooner or later achieve its goal of monopoly in the relevant market;

4. That the defendants' conduct occurred in or affected interstate commerce; and,

5. That the plaintiff was injured in the business or property by the defendants exclusionary or restrictive conduct.

Spectrum claims that the District Court erred in not directing a verdict or entering JNOV on the Sherman Section 2 claims because the evidence was legally insufficient to sustain the verdict. On the "attempt to monopolize" claim specifically, Spectrum argues that the record contains no evidence that Spectrum intended to destroy competition or that they committed any anti-competitive conduct directed towards that purpose.

Spectrum also contends that the Court erred in not directing a verdict or granting JNOV on the monopolization claims because there was no evidence that they had monopoly power, committed any predatory acts, or that any antitrust injury resulted from their conduct.

The Ninth Circuit, in a series of cases beginning with *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), has held that sufficiently unfair or predatory conduct alone may satisfy both the specific intent and the dangerous probability elements of the offense, without any proof of the relevant market or the defendant's marketpower. 327 F.2d at 474-75. Some of

the opinions, including *Lessig*, dispensed with dangerous probability of success as an element of the offense since it may be inferred from proof of specific intent, which in turn may be inferred from conduct. In *Lessig*, Tidewater entered into a service station lease and dealer contract with Lessig and cancelled it later. The theory of Lessig's case was that Tidewater violated the antitrust laws by fixing the prices at which its dealers resold gasoline and by imposing upon its dealers a system of exclusive dealing and tieing arrangements in the purchase of petroleum products, tires, batteries, and automotive accessories which were sold or sponsored by Tidewater. The trial court withdrew from the jury the charge that Tidewater attempted to monopolize in violation of Section 2 of the Sherman Act. In reversing the trial court the court said:

> "The essence of monopoly is power to control prices and exclude competition and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce.
>
> Tidewater argues that attempt to monopolize is established only if there is proof of 'dangerous probability of success, i.e., that if unchecked, monopolization will result'; that this requires an evaluation of Tidewater's power in the relevant market; that the evidence on this issue was inadequate, and such evidence as there was indicated a lack of any possibility that Tidewater could monopolize the sale of petroleum products or tires, batteries, and automotive accessories. (TBA)
>
> We reject the premise that probability of actual monopolization is an essential element of

> proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires – perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.
>
> When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not an issue.' (Citations omitted) Section 2 prohibits attempts to monopolize 'any part' of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products. If the jury found that Tidewater intended to fix the price at which 2,700 independent service station operators resold gasoline and to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of those operators, and took steps to accomplish that purpose, it could properly conclude that Tidewater attempted to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act." *Id.*

Later cases in the Ninth Circuit have followed *Lessig* and refined its language. In *California Computer Products, Inc. v. International Business Machines, Corp.*, 613 F.2d 727, 737 (9th Cir. 1979), the court said that evidence of market-power is not an "independent" element of an attempt claim, citing *Hallmark Industry v. Reynolds Metals Co.*, 499 F.2d 8, 12, n.3 (9th Cir. 1973). In *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 669-70 (9th Cir. 1980) the court recognized that while evidence of marketpower is not vital, it may be relevant to suggest the existence of

specific intent. It stated: "The real issue in this type of case is one of specific intent to monopolize, and we find nothing in *Lessig* which excludes consideration of market-power as one of the circumstances to be considered in determining whether such intent exists."

We are satisfied that if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower. If there is not sufficient evidence of unfair or predatory conduct, then the plaintiff will be required to show proof of relevant market or the defendant's marketpower. In *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979), an action claiming attempt to monopolize was brought against a retirement community newspaper that refused to accept carpet advertisements from dealers outside the retirement community. Over the plaintiff's insistence that proof of relevant market was unnecessary in their attempt claim, the Ninth Circuit held that "in the absence of proof of relevant market and marketpower, the plaintiff must prove either predatory conduct or a per se violation of Section 1 to prove an attempt to monopolize. . . . ". 585 F.2d at 390.

The District Court instructed the jury that "if the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing power." There was no objection to this instruction.

The record shows that Spectrum, acting through Jr., engaged in the following conduct:

When McQuillan became interested in Sorbothane she spent a day at H-K. At this time Jr. was Vice President of Marketing for H-K. Jr. informed her that they, H-K, had not previously considered equestrian uses for Sorbothane. At this time McQuillan presented her ideas to Jr. and other H-K personnel concerning the making of horseshoe pads or equestrian products from Sorbothane. She was also introduced to Sr. on that trip.

Jr. left H-K and decided to become a distributor for Sorbothane. Up to this time he had been with H-K and was aware of McQuillan's efforts to develop an equestrian product. Jr., as Vice President of Marketing at H-K, had been involved in establishing the regional distributor concept and the selection of the individual distributors. There is evidence that Jr. was an enthusiastic enforcer of H-K's price fixing agreements. He boasted to Heinsohn that he had his own method of policing his retailers – he would slow down their shipments if they sold below a suggested retail list price. Jr. confided to Heinsohn that he wanted to be the national Sorbothane distributor from the beginning. He and Sr. were concerned that they would be criticized for violating BTR's anti-nepotism policy if Jr. were immediately given a national distributorship.

In January 1982 there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, marketed Sorbothane in England. He was interested in becoming the national Sorbothane medical distributor in the United States over the

objections of Heinsohn, who felt the distributors had been promised the medical market. IEM was appointed national medical distributor of Sorbothane products. In order to have effective control of resale prices, it would be important to have only one person to deal with on athletic products. The result of a January 1982 meeting was an agreement that Jr. would be H-K's new national athletic distributor. In the meantime they had the problem of getting rid of the regional distributors. Jr. attempted to buy McQuillan's business and told her that if she did not agree to sell to him, she would be "looking for work." This was shortly after McQuillan was told that she would have to sell her athletic distributorship to Jr. in order to keep the equestrian distributorship rights. Sorbo, Inc. at Jr.'s direction, placed a hold on one of McQuillan's shipments of products. After her termination, Sr. gave Jr. McQuillan's customer list without consulting with her.

There is sufficient evidence from which the jury could conclude that the S.I. Group and Spectrum Group engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power.

The District Court should grant a Motion for Directed Verdict only if, considering all the evidence and all reasonable inferences that can be drawn from the evidence in a light most favorable to the non-moving party, reasonable men could not arrive at a verdict in favor of the non-mover. Applying this standard, the trial court was correct in refusing to direct a verdict in defendants favor. There

is sufficient evidence in the record to sustain the attempt to monopolize claim.

PROOF OF ANTITRUST INJURY TO ESTABLISH SECTION 2 CLAIM

S.I. and Spectrum complain that the jury instructions did not require McQuillan to prove an antitrust injury to establish the Section 2 claim. They also argue that the Court should have granted their Motion for JNOV because the plaintiff offered no evidence to prove that their conduct negatively affected competition. Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as per se violations of the Sherman Act. Injury to competition is presumed to follow from the conduct proscribed by these Sections. *United States v. Topco, supra; Walker v. U-Haul Co. of Mississippi,* 747 F.2d 1011 (5th Cir. 1984). The jury was properly instructed on the antitrust violations and there was sufficient evidence in the record to show that McQuillan was injured as a result of the defendants' conduct.

THE ALTER EGO INSTRUCTION

The jury found that H-K was the agent or alter ego of BTR, Inc. S.I. argues that the Court improperly instructed the jury regarding alter ego because it failed to properly explain that the absence of the corporate form causing the inequitable result must:

1. amount to bad faith;

2. be the product of the acts or omissions of the entity against whom liability is sought – here BTR; and,

3. proximately harm or prove to be unjust to McQuillan. *Orloff v. Allman*, 819 F.2d 904 (9th Cir. 1987). S.I. also argues that the party against whom the alter ego doctrine is invoked must have been an actor in the course of conduct constituting the "abuse of the corporate privilege".

The jury instructions given by the Court were consistent with the cases cited by S.I. in support of its arguments.

The jury was instructed that a corporation is a separate legal entity. The jury was further instructed that the corporate form can be disregarded where:

> [T]here is such a unity of interest and ownership that the separate personalities of the parent corporation and the subsidiary no longer exist; and . . . an inequitable result would follow if the acts are treated as those of the subsidiary corporation alone.

The jury was specifically told to consider:

> One, whether the parent corporation is the principal stockholder of the subsidiary corporation; two, whether the parent corporation uses the subsidiary corporation as its marketing or distributing arm; three, whether the officers and directors of the two corporations are the same; four, whether the parent corporation holds the other corporation out to the public as a mere division or agent; five, whether the parent corporation has sufficient involvement with the day-to-day operation of the subsidiary corporation; six, whether the corporations have conducted separate board meetings and maintained

> separate minutes of board meetings; and whether an inequitable result will occur if the conduct is not attributable to both defendants.

Finally, the jury was cautioned:

> However, it is not sufficient in this regard for the plaintiff to show merely that the defendant BTR, Inc., owns all the stock in the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company, or that the officers or directors of Sorbothane, Inc., and Hamilton Kent Manufacturing Company are the same as those of the defendant BTR. Factors which may be relevant in showing the domination or control include proof that there was a commingling of assets, that there was representations to the plaintiff that BTR, Inc. was liable for the debts of the defendants Sorbothane, Inc., and Hamilton Kent Manufacturing Company; that the defendant Sorbothane Inc., and Hamilton Kent Manufacturing Company used the same employees and facilities as the defendant BTR, Inc.; and that the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company were mere shells or conduits for business which was fed directly to BTR, Inc.
>
> Each of these factors must be balanced and weighed by you to see if, in the totality of the evidence, the preponderance proves any lack of independent existence or control by the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing.

These jury instructions were consistent with *Orloff, supra,* which states:

> The California alter ego doctrine . . . applies where:

> (1) such a unity of interest and ownership exists that the personalities of the corporation and individual are no longer separate, and
>
> (2) an inequitable result will follow if the acts [giving rise to liability] are treated as those of the corporation alone.

819 F.2d at 908-09, citing *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985) and *Automotriz Del Golfo De California, S.A. De C.V. v. Resnick*, 47 Cal.2d 792, 797, 306 P.2d 1, 4 (1957); *see also, Firstmark Capital Corp. v. Hempel Financial Corp.*, 859 F.2d 92, 94 (9th Cir. 1988).

S.I. argues that BTR must have been guilty of "wrongdoing" for the alter ego doctrine to apply. In *Firstmark*, this Court stated

> "A California Court of Appeal stated the [alter ego liability] rule thus, 'The fraud or inequity sought to be eliminated must be that of the party against whom the alter ego doctrine is invoked, and "such party must have been an actor in the course of conduct constituting the 'abuse of the corporate privilege'. . . . " ' *American Home Insurance Co. v. Travelers Indemnity Co.*, 122 Cal.App.3d 951, [966], 175 Cal.Rptr. 826, 834 (1981) (citations omitted)."

Firstmark Capital Corp. v. Hempel Financial Corp., supra, 859 F.2d at 94.

The jury instructions here were consistent with *Firstmark*. BTR, through Cahill, was an actor in the course of conduct constituting the abuse of the corporate privilege. *Firstmark* does not suggest that BTR had to have an evil motive or be independently liable for the wrongdoing.

Indeed, alter ego liability is unnecessary if a party is independently liable.

S.I. contends that BTR merely engaged in the "normal supervisory actions" of a parent corporation. The jury, properly instructed on the relevant factors, resolved this factual issue against BTR and there was substantial evidence to support their conclusion.

ATTORNEYS FEES

The parties agree that the standard of review is abuse of discretion or clear error of law. What constitutes an appropriate award of attorneys fees and any enhancement thereof for payment delay or risk of non-payment are matters within the trial court's discretion.

The trial court denied McQuillan's request for fee enhancement based on delay and risk of non-payment and also rejected a portion of the alleged lodestar. McQuillan appeals only from the denial of enhancement. McQuillan sought enhancements totalling $574,042.00 for the delay in payment and for the risk of non-payment.

McQuillan argues that *Missouri v. Jenkins by Agyai*, ___ U.S. ___, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) holds that reasonable attorneys fees, in cases involving contingent fee agreements, *must* include compensation for delay in payment and may include enhancement for the risk of non-payment. This is an incorrect statement of the holding in that case and counsel conceded as much in oral argument. The Court held that an enhancement for delay in payment is "an appropriate factor in the determination

of what constitutes a reasonable attorney's fee. . . . " 109 S.Ct. at 2469. It did not hold that it was mandatory.

The District Court pointed out that the Court in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) noted the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. As pointed out by S.I. and Spectrum, the trial court gave a "de facto" enhancement by utilizing the "average" hourly rate advanced by McQuillan in support of the fee application. This "average" was in fact a weighted mean calculated by dividing the total billed by the total hours. This adopted a higher billing rate set at current rates which is one of the common methods of enhancement for delay. *Jenkins*, 109 S.Ct. at 2469.

The Court explained its reasoning in denying enhancement and its decision is affirmed. There was no abuse of discretion.

THE DAMAGE AWARD

The jury returned the same damage award, $1,743,000.00, against all defendants on each Count on which they were found liable. Spectrum and Jr. argue that they were not found liable on some of the claims and certain claims were not even asserted against them, therefore, the Court erred in not granting a new trial due to the inconsistent damage awards. S.I. puts forth the same argument adding that there was obvious jury confusion and misunderstanding, thereby requiring a new trial.

The Seventh Amendment right to a jury trial requires validation of verdicts if at all possible. *Pierce v. Southern Pacific Transportation Company*, 823 F.2d 1366, 1370 (9th Cir. 1987). The Court has the duty to reconcile the jury's special verdict responses on any reasonable theory consistent with the evidence. *Pierce, supra*, at 1370, *Ortiz v. Bank of America National Trust and Savings*, 852 F.2d 383 (9th Cir. 1988), *In Re Hawaii Federal Asbestos Cases*, 871 F.2d 891, 894 (9th Cir. 1989), citing *Gallick v. Baltimore & O. R.R.*, 83 S.Ct. 659, 666-67, 372 U.S. 108, 119-22 (1963). The verdict against S.I. Group on the Sherman Act Section 1 claim is supported by the evidence as has been set forth herein before. The verdict against S.I. Group and Spectrum Group on the attempt to monopolize claim is also supported by the evidence. The Court need not address the arguments that the damages awarded on the other verdicts are not supported by the evidence.

OTHER ISSUES RAISED BY S.I. GROUP AND SPECTRUM GROUP

S.I. Group and Spectrum Group raise many other issues relating to the pendant state claims and the RICO claims. In view of the foregoing, it is not necessary for the Court to address any of those issues.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY McQUILLEN, et al.,	)	No. 89-55326
	)	89-55329
Plaintiffs/Appellees/ Cross-Appellants,	)	89-55332
	)	(Consolidated)
vs.	)	
	)	ORDER
SORBOTHANE, INC., et al.,	)	
	)	
Defendants/Appellants/ Cross-Appellees.	)	(Filed April 1, 1991)
	)	

BEFORE: TANG and O'SCANNLAIN, Circuit Judges, and MARQUEZ, District Judge*

The panel has voted to amend its July 3, 1990 Memorandum Decision as follows:

At page 22, the final sentence of the first full paragraph reading: "There was no objection to this instruction." shall be deleted.

With the Memorandum Decision so amended, the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

---

* Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, dba SORBOTURF ENTERPRISES, Plaintiffs, v. SORBOTHANE, INC., aka SORBO, INC.; HAMILTON-KENT MFG. COMPANY, INC.; BTR, INC.; SPECTRUM SPORTS, INC.; KENNETH M. LEIGHTON; and KENNETH B. LEIGHTON, JR.; Defendants.	Civil No. 84-1585-E(CM) MEMORANDUM DECISION (Filed Dec. 19, 1988)

BACKGROUND

This is a case against multiple defendants brought by plaintiffs Shirley McQuillan and her husband, Larry, alleging that their exclusive distributorship for the product Sorbothane was wrongfully terminated. Sorbothane is a patented polymer material valued for its shock absorbent tendencies. Most notable among its uses is its cushioning effect in athletic shoes.

Plaintiffs' complaint alleged violations of state and federal antitrust and racketeering laws, as well as asserting common law contract and tort claims. After an eight-week trial ending on July 11, 1988, the jury found all defendants liable on each and every claim of relief, with the exception of defendants Spectrum Sports and Kenneth B. Leighton, who were found liable on all but three claims of relief. A jury award of $1,743,000 was rendered

on all claims. A punitive damage jury award of $500,000 was later waived by the plaintiffs.

Defendants now move for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Plaintiffs move the court to award attorney's fees, prejudgment interest, and to retax costs.

I.

JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) OR FOR NEW TRIAL

Defendants move for a JNOV or, in the alternative, a new trial. Essentially, defendants question the sufficiency of proof on all of the plaintiff's claims, as well as question the amount and form of the damage verdict and certain evidentiary rulings made by this court.

A motion for a JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same legal test as for a directed verdict. *Fountila v. Carter*, 571 F.2d 487, 489-90 (9th Cir. 1978). In making a determination on a JNOV, the court considers "all evidence in the light most favorable to the non-moving party and draw[s] all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1423 (9th Cir. 1986). A JNOV "is not proper if there is substantial evidence to support a verdict for the non-moving party." *Id.* Further, such motions should be cautiously and sparingly granted as there must be a minimum of interference with the jury. *Walker v. KFC Corp.*, 515 F. Supp. 612, 616 (S.D. Ca. 1981), *aff'd in part and rev'd in part*, 728 F.2d 1215 (9th Cir. 1984), *citing* 9 Wright & Miller, *Federal Practice and Procedure*, § 2524 (1971).

"A party may secure a JNOV only 'in accordance with its motion for a directed verdict.' " *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir. 1986), *quoting* Fed. R. Civ. P. 50(b). A directed verdict motion can therefore serve as a prerequisite to a JNOV "only if it includes the specific grounds asserted in the JNOV motion." *Id.* at 1429. *See also* 9 Wright & Miller, *Federal Practice and Procedure*, § 2537 (1971).

In contrast, a motion for new trial does not test the legal sufficiency of the evidence adduced at trial by the prevailing party. *Walker*, 515 F. Supp. at 619. Instead, it may be granted by the court "if in its opinion, the jury's verdict was clearly contrary to the weight of the evidence." *William Inglis, Etc. v. ITT Continental Baking Co.*, 688 F.2d 1014, 1027 (9th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982).

The instant case involved a lengthy and complex trial. Both sides submitted extensive testimony and documentary evidence in support of their positions. This court has fully considered the papers submitted on the issues, as well as the argument of counsel; however, it declines to substitute its judgment for that of the jury. The parties received a fair and impartial trial, and the record in this case reasonably supports the jury's verdict. Accordingly, the court denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial.

II.

ATTORNEY'S FEES

Section 4 of the Clayton Act, 15 U.S.C. § 15 allows a successful treble damage plaintiff to recover reasonable

attorneys' fees as costs of suit. The purpose of the attorneys' fees provision is to insulate treble damage recovery from large expenditures for legal fees. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982). *Accord Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 663 (7th Cir. 1985). "An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory." *Twin City Sportservice*, 676 F.2d at 1312.

Similarly, the Racketeer Influenced and Corrupt Organizations Act (RICO) permits the successful plaintiff in a civil RICO action to recover reasonable attorneys' fees as a part of the costs of suit. 18 U.S.C. § 1964(c). The same applies under section 16750(a) of the California Business and Professions Code, the California Cartwright Act.

" 'The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.' " *Pennsylvania v. Delaware Valley Citizens' Council (Delaware I)*, 106 S. Ct. 3088, 3097 (1986), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This establishes a lodestar figure. Additionally, a district court may adjust the fee upward or downward based upon the factors identified in *Kerr v. Screen Actors Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (adopting twelve factors set forth in *Johnson v. Georgia Statistics Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).[1]

---

[1] Those factors include: 1) the time and labor required, 2) the novelty and difficulty of the questions involved, 3) the skill

(Continued on following page)

However in *Delaware I*, the Supreme Court held that many of the *Kerr* factors " 'are subsumed within the initial calculation of the lodestar amount.' " 106 S. Ct. at 3098, *citing Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). The Court did not preclude upward adjustments of the lodestar, although it noted that such modifications are proper only in " 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id., citing Blum*, 465 U.S. at 898-901. Therefore, there is a strong presumption that the lodestar amount represents a reasonable fee. *Id.* at 3098.

Plaintiffs prevailed on each of their claims for relief predicated on RICO and the federal and state antitrust laws against each of the defendants. Accordingly, they now seek attorneys' fees of $1,759,969. This includes a lodestar amount of $1,185,927 reflecting 9,008.4 hours as of September 19, 1988 at an average billing rate of $130.94.[2]. Additionally, plaintiffs seek an enhancement

---

(Continued from previous page)

requisite to perform the legal service properly, 4) the preclusion of ~~other~~ employment by the attorney due to acceptance of the case, 5) the customary fee, 6) whether the fee is fixed or contingent, 7) time limitations imposed by the client or the circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation, and ability of the attorneys, 10) the "undesirability" of the case, 11) the nature and length of the professional relationship with the client, and 12) awards in similar cases.

[2] This court adopts the plaintiffs' average billing rate of $130.94 as a reasonable hourly rate. *See* Verified Application for an Award of Attorneys' Fees, Declaration of James F. Stiven, page 8, ¶11.

for delay in payment of $137,358, and an enhancement of thirty-three percent, $436,684 for the risk of nonpayment.

In examining the lodestar, this court may consider only the time spent in prosecuting those claims supporting the imposition of attorneys' fees. *See, e.g., Twin City Sportservice,* 676 F.2d at 1316. Thus, time devoted to work that is duplicative or connected to claims or activities unrelated to the successful recovery of those claims supporting attorneys' fees may be excluded. *Id. Accord, In re Equity Funding Corp. of America Securities,* 438 F. Supp. 1303, 1328 (C.D. Cal. 1977).

Further, it is plaintiff's burden to establish the amount of compensable attorney time. *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc,* 776 F.2d 646, 650 (7th Cir. 1985). Vague or insufficient documentation of hours is not compensable. *Exhibitors' Service, Inc. v. American Multi-Cinema,* 583 F. Supp. 1186, 1193 (C.D. Cal. 1984); *In re Equity Funding,* 438 F. Supp. at 1327.

Defendants have raised numerous objections to plaintiffs' lodestar amount. They include objections to the pendent state claims, duplicate time, and inconsistent or insufficient documentation. The BTR defendants in a Supplemental Memoranda filed October 18, 1988 have detailed amounts that they consider to be appropriate deductions as to these categories. This court has fully considered those objections which it considers to be reasonable and grounded in case law and, consequently, applies a deduction of $273,894.50 to plaintiffs' requested

lodestar amount.[3] This provides for a lodestar amount of $912,032.50 reflecting 6,965.3 hours at the average hourly billing rate of $130.94.

Lastly, as noted above, plaintiffs seek enhancements totaling $574,042 for the delay in payment and for the risk of nonpayment. *See Pennsylvania v. Delaware Valley Citizens' Council (Delaware II)*, 107 S. Ct. 3078 (1987) (dealing with issue of enhancement for risk of nonpayment). This court determines that an enhancement of the lodestar is inappropriate. It has considered the narrow standards as set out in *Delaware II* to justify enhancement based upon the risk of nonpayment, but finds that the plaintiffs have not met their burden in meeting those standards.

Further, this conclusion acknowledges the *Delaware I* decision noting the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. 106 S. Ct. at 3098. Limiting attorneys' fees in this manner is neither unfair nor unjust to the plaintiffs or plaintiffs' attorneys, instead it is consistent with the rationale behind fee-shifting statutes, including those in the instant case. *Delaware I*, 106 S. Ct.

---

[3] This total includes deductions of $164,362.50 for pendent state claims, $11,812 for duplicative time, and $97,720.00 reflecting inconsistent or insufficient entries. Supplemental Memorandum of Defendants Sorbothane, Inc., Hamilton-Kent Manufacturing Company, Inc., BTR, Inc., and Kenneth M. Leighton Re: Plaintiffs' Application for Attorneys' Fees, p. 8, n.5.

at 3098-99. Accordingly, this court finds that plaintiffs are entitled to a reasonable fee award of $912,032.50.

III.

PREJUDGMENT INTEREST

A district court may award prejudgment interest on compensatory damages in order to make an injured party whole. *American Timber & Trading v. First Nat. Bank of OR.*, 690 F.2d 781, 784 (9th Cir. 1982), *citing United States v. Cal. State Bd. of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981). An award of prejudgment interest in a case is left to the sound discretion of the trial court. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982). It is this court's view that plaintiffs have received full and complete recovery for their alleged injury and, therefore, declines to award prejudgment interest.

IV.

RETAX COSTS

This court may review the clerk's assessment of costs *de novo* and "to decide the cost question himself" by exercising its own discretion. *Farmer v. Arabian-American Oil Co.*, 379 U.S. 227 (1964); *Chavez v. Tempe U. Hight Sch. Dist. No. 213*, 565 F.2d 1087 (9th Cir. 1977). Plaintiffs seek to recover the costs of their computer-assisted legal research and costs of copying incident to discovery. The clerk of the court allowed those items properly chargeable as costs. Plaintiffs' motion to retax costs is denied.

V.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth herein, the court hereby denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. Additionally, the court grants plaintiffs' motion for attorneys' fees in the amount of $912,032.50. Plaintiffs' motions for pre-judgment interest and to retax costs are denied.

DATED: December 19, 1988.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:

Plaintiffs

Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, dba SORBOTURF ENTERPRISES, Plaintiffs,	)	Civil No. 84-1585-E(CM)
v.	)	ORDER
SORBOTHANE, INC., aka SORBO, INC.; HAMILTON-KENT MFG. COMPANY, INC.; BTR, INC.; SPECTRUM SPORTS, INC.; KENNETH M. LEIGHTON; and KENNETH B. LEIGHTON, JR.; Defendants.	)	

Pursuant to this court's Memorandum Decision dated December 19, 1988, defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial, is denied. Additionally, the court grants plaintiffs' motion for attorneys' fees in the amount of $912,032.50. Plaintiffs' motions for prejudgment interest and to retax costs are denied.

DATED: December 19, 1988.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:
Plaintiffs
Defendants

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

(2)

No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., BTR, INC.,
HAMILTON-KENT MANUFACTURING COMPANY,
and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

* JEFFREY M. SHOHET
MARCELLE E. MIHAILA
GRAY, CARY, AMES & FRYE
401 B Street, Suite 1700
San Diego, California 92101
(619) 699-2742
Counsel for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Should a verdict of attempt to monopolize under Section Two of the Sherman Act be sustained when the jury was permitted to infer specific intent and dangerous probability of success under *Lessig v. Tidewater Oil Co.*, but also adjudged defendants liable for monopolization, thereby finding (without the benefit of any inference) that defendants had actual monopoly power in the relevant market?

2. Under the rule articulated in *Copperweld Corp. v. Independence Tube Corp.*, can two corporations legally conspire when there is no evidence that they are subsidiaries of a common parent, when the uncontradicted evidence establishes that they do not operate as part of a common economic enterprise and when the two corporations were in fact competitors before entering into an unlawful horizontal market allocation?

3. Is the trial court's refusal to give a jury instruction on antitrust injury reversible error given that antitrust injury is a legal issue, not a factual issue, and when, in any event, the plaintiff established classic antitrust injury as a matter of law?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the Ninth Circuit were Larry McQuillan and Shirley McQuillan (dba Sorboturf Enterprises); Sorbothane, Inc.; BTR, Inc.; Hamilton-Kent Manufacturing Company; Kenneth M. Leighton; Spectrum Sports, Inc.; and Kenneth B. Leighton.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW ii

OPINION BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

A. Procedural Background 6

B. Factual Background 7

1. Vertical Price Fixing 7

2. Horizontal Market Allocation 9

3. Monopoly 9

4. Conspiracy to Monopolize 9

REASON FOR DENYING THE PETITION 10

A. The Petition for Writ of Certiorari Fails to Meet the Supreme Court Rule 10 Standard of Presenting Special or Important Reasons for Review on Writ of Certiorari 10

B. McQuillan Established the Relevant Market and SI's Market Power; The Lessig Inference Was Unnecessary to the Verdict and Does Not Furnish a Basis for the Grant of Certiorari ... 11

C. The Evidence in This Case Disproves the Existence of a Legitimate Copperweld Issue 13

D. Antitrust Injury is a Legal Issue, Not a Factual Issue for the Jury; In Any Event, McQuillan Established Antitrust Injury as a Matter of Law 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Assoc. General Contractors of California v. Calif. State Council of Carpenters, 459 U.S. 519 (1983) 15

Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990) 6, 15, 18, 19

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 15, 17

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 12

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) ..... *passim*

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 15

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 4, 11, 12, 13

Sommerville v. United States, 376 U.S. 909 (1964) 10

Superintendent v. Hill, 472 U.S. 445, 461 (1985) 11

United States v. General Motors Corporation, 384 U.S. 127 (1966) 17

United States v. Grinnell Corp., 384 U.S. 563 (1966) ..4, 12

STATUTES

Clayton Act section 4 (15 U.S.C. § 15) 3

Sherman Act section 1 (15 U.S.C. § 1) 2, 4, 5

Sherman Act section 2 (15 U.S.C. § 2) 2, 4

MISCELLANEOUS

Supreme Court Rule 10 10

No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN, d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondents Larry and Shirley McQuillan respectfully submit this Opposition to the Petition for Writ of Certiorari filed by Sorbothane, Inc., BTR, Inc., Hamilton-Kent Manufacturing Company and Kenneth M. Leighton:

OPINION BELOW

The Memorandum Decision of the Ninth Circuit Court of Appeals is attached to the Petition as Appendix A at pp. 3-33.

JURISDICTION

Respondents do not disagree with petitioners' Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

> States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

INTRODUCTION

Petitioners Sorbothane, Inc. ("SI"), Hamilton-Kent Manufacturing Company ("H-K") and Kenneth M. Leighton ("Leighton Senior") identify three issues they claim justify certiorari in this case. However, in both their "Questions Presented" and substantive arguments, petitioners either misrepresent the operative facts or misstate the law in their effort to manufacture an issue worthy of Supreme Court review. In fact, the Memorandum Decision in this case raises no such issue. Moreover, no issue petitioners raise is even dispositive of the case.

Petitioners' first issue is whether an attempt to monopolize finding can be sustained when the "jury has not been charged that it must find either specific intent or dangerous probability of success." This issue is not dispositive of this case since petitioners were also found

liable on multiple Sherman Act Section One and Two claims and RICO claims, all of which support the trebling of damages. More importantly, petitioners misrepresent the record. The jury *was* instructed that it had to find specific intent and dangerous probability of success on the attempt to monopolize claim. It was merely instructed that it was *permitted* to infer these elements from petitioners' predatory conduct under *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

Petitioners make much of the alleged need to disapprove the *Lessig* rule. However, the *Lessig* inference was unnecessary to the attempt to monopolize finding. In addition to finding petitioners liable for attempt to monopolize, the jury found them liable for monopolization under Section Two. That latter finding required the jury to define the relevant market and conclude (without the benefit of the *Lessig* inference) that petitioners had monopoly power in that market. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). Thus, the inference *Lessig* permits was wholly unnecessary to the jury's finding of liability under Section Two. Accordingly, whether or not the *Lessig* rule should be reevaluated by this Court, it would not be appropriate to do so in this case.

As their second "question," petitioners ask whether "concerted activity between two wholly-owned subsidiaries of a common ultimate parent" can violate Section One of the Sherman Act under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). This argument is relevant to only one of the two Section One claims on which petitioners were found liable – the horizontal

market allocation claim.[1] More importantly, there was no evidence that SI and Leyland (the two companies that agreed to geographically divide the world market) were subsidiaries of a common parent. In fact, the evidence established that the two companies were not sisters, although both may have been somehow remotely affiliated within the BTR "family" of 650 companies. In any event, even if the two companies had been wholly-owned subsidiaries of a common parent, the uncontradicted evidence was that all of the "BTR" units operated autonomously. Further, the two companies did not act at the common direction of a parent company; indeed, SI's license (from another BTR company upstream) directed it to sell Sorbothane "in all world markets." Significantly, the evidence established that before SI and Leyland divided up the world market, they were competitors. Thus, there is no legitimate *Copperweld* issue in this case.

Finally, petitioners ask whether a verdict based on an antitrust violation under the Sherman Act can be sustained in the absence of a jury instruction on the meaning of, and necessity for, antitrust injury. This issue only pertains to the antitrust claims and is irrelevant to the RICO claims. More importantly, and as petitioners themselves acknowledged in the pre-trial order, antitrust injury is a legal issue for the Court, not a factual issue for the jury. In any event, McQuillan established as a matter

---

[1] The other Section One claim on which petitioners were found liable (Resale Price Maintenance) involved concerted activity by more than the two purportedly affiliated companies alleged to be incapable of conspiring.

of law paradigm antitrust injury. She proved that petitioners eliminated her source of Sorbothane and terminated her distributorship pursuant to a group boycott in furtherance of a *per se* price fixing scheme. The horizontal market allocation between SI and Leyland independently ensured that McQuillan, a consumer and potential competitor, had no alternate source of Sorbothane. This is classic antitrust injury. Neither *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990) nor any other case compels a contrary conclusion.

STATEMENT OF THE CASE

A. Procedural Background.

This is a lawsuit by Shirley and Larry McQuillan[2] d/b/a Sorboturf Enterprises for violations of state and federal antitrust laws, various RICO violations, state law unfair competition and interference with prospective advantage. All defendants appealed. In a Memorandum Decision,[3] the Ninth Circuit Court of Appeals affirmed each of the antitrust verdicts. Since it was unnecessary in light of these affirmances, the Ninth Circuit did not specifically address the multiple verdicts under RICO or the state law claims.

---

[2] Since Shirley McQuillan was the central actor in the events preceding the filing of this lawsuit, and unless the context indicates otherwise, "McQuillan" in this brief refers to her.

[3] Petitioners erroneously refer to this unpublished disposition as an "opinion" throughout their petition.

B. Factual Background.

McQuillan will not repeat the comprehensive factual statement set forth in the Ninth Circuit decision. McQuillan (through her business, Sorboturf) was appointed by H-K as one of several regional distributors of Sorbothane[4] athletic shoe inserts. She also worked extensively to develop a Sorbothane horseshoe pad for which H-K promised her the national equestrian distributorship. In furtherance of petitioners' scheme to fix Sorbothane prices, and as a consequence of a horizontal market allocation between SI[5] and an English company, McQuillan's distributorship – and thus her ability to compete in the Sorbothane athletic insole market – was destroyed. The following summarizes the key facts underlying each antitrust violation on which the jury found petitioners liable:

1. *Vertical Price Fixing.* H-K's distributors were required to agree – and did agree – to sell to retailers at a fixed markup. H-K also required its distributors to "police" their retail customers to prevent any discounting at the retail level.[6] However, H-K knew that regional

---

[4] Sorbothane is a patented visco-elastic polymer that, although a solid, absorbs energy like a liquid.

[5] BTR, Inc., through a subsidiary, owned H-K, which handled the American Sorbothane business. In 1982, BTR, Inc. established a new company, S.I., to which the Sorbothane business was moved. Thus, references are to H-K or, alternatively, SI, depending on the time frame. For purposes of this brief, the two corporations are interchangeable.

[6] H-K told distributors that any retailers caught discounting Sorbothane insoles were to be denied further Sorbothane shipments. Further, H-K warned distributors that violating the pricing agreement placed their distributorships in jeopardy.

distributors were violating the price fixing agreements. The only regional distributor who always enforced the price fixing agreements was Leighton Junior, son of Leighton Senior (President of H-K).

In January 1982, Leighton Senior, Leighton Junior, Laurene Heinsohn (SI's marketing manager) and John Burne met to discuss the "problem of control" with the regional distributors. SI had appointed Burne's company as the national Sorbothane medical distributor. It would be selling as "medical products" the same insoles the regional distributors were marketing as athletic insoles. However, the "medical" insoles could command much higher prices in the retail medical market. The regional distributors threatened both the high athletic insole prices and the even higher "medical" insole prices by violating the price fixing agreements. A single national athletic distributor – especially a loyal and enthusiastic price fixer like Leighton Junior – would ensure high prices in both the athletic and medical markets. Accordingly, the group decided to replace the regional distributors with Leighton Junior.

Pursuant to that January 1982 meeting, SI terminated two distributors on the pretext of credit problems. However, McQuillan had excellent credit. Thus, SI tried to harass her into relinquishing her athletic distributorship.[7] It also tried to entice – and then threaten – her to relinquish her athletic distributorship in exchange for the

---

[7] For example, it placed new, onerous, and undeserved credit limits on McQuillan, withheld her shipments of product, and gave her such short notices of price increases that she could not pass the increases on to her customers.

national equestrian distributorship she had already been promised. When those efforts failed, SI, without explanation, terminated McQuillan's distributorship (thereby eliminating her source of Sorbothane) in August 1983.

2. *Horizontal Market Allocation.* When SI terminated McQuillan's distributorship, she attempted to keep her distributorship alive by purchasing Sorbothane manufactured by the other licensed manufacturer, an English company called Birmingham and Leyland ("Leyland"). However, SI and Leyland had entered into what they described as a "harmonious marketing relationship." Under this agreement, SI would not sell into Leyland's territory (Europe) and in exchange, Leyland would not sell into SI's territory (United States and Canada). Thus, when SI eliminated McQuillan's source of Sorbothane, she had no alternate source. Her distributorship – and any competitive threat to SI she would have posed – was finally destroyed.

3. *Monopoly.* Sorbothane is a unique material and unlike any other material from which shoe inserts are made. Petitioners' own documents reflect that there was no substitute for Sorbothane. Moreover, H-K (and then SI) was the only manufacturer of Sorbothane athletic shoe inserts in the United States. Thus, H-K could and did absolutely control Sorbothane prices and exclude competition.

4. *Conspiracy to Monopolize.* The jury, properly instructed, found that petitioners' plan to eliminate the regional distributors in furtherance of their price fixing scheme also constituted conspiracy to monopolize the Sorbothane shoe insert market.

REASON FOR DENYING THE PETITION

A. The Petition for Writ of Certiorari Fails to Meet the Supreme Court Rule 10 Standard of Presenting Special or Important Reasons for Review on Writ of Certiorari.

Under Supreme Court Rule 10, this Court grants certiorari "only when there are special and important reasons therefor." This case does not merit Supreme Court review for several reasons. First, this Memorandum Decision is unpublished. Thus, it does not create a "conflict" with any other case because it is not precedent. A grant of certiorari could only affect these parties and do no more than correct an error – if one existed – by the lower court.

Additionally, none of the issues raised by the Petition are dispositive of the case. Indeed, only one of the arguments – antitrust injury – applies to all of the antitrust claims. Since the resolution of petitioners' issues will not affect the ultimate outcome of the case, this Court should deny the petition for certiorari. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964).

Finally, each of petitioners' purported legal issues in reality turns on the specific facts of this case. For example, the *Lessig* argument ignores the jury's finding – based on substantial evidence – that petitioners were liable for monopolization. The *Copperweld* argument hinges on the false premise that SI and Leyland were wholly owned subsidiaries of a common parent. The antitrust injury argument (in addition to ignoring that it is not a jury issue) ignores that McQuillan's injury was classic antitrust injury. Properly understood, none of the petitioners'

alleged issues can be meaningfully analyzed without reviewing and reweighing the relevant evidence. However, "(w)e do not grant a certiorari to review evidence and discuss specific facts." *Superintendent v. Hill*, 472 U.S. 445, 461 (1985).

B. McQuillan Established the Relevant Market and SI's Market Power; The *Lessig* Inference Was Unnecessary to the Verdict and Does Not Furnish a Basis for the Grant of Certiorari.

Petitioners argue that the Ninth Circuit's affirmance of the attempt to monopolize claim "can only be rationalized with the assumed validity of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964)." Thus, petitioners argue, this Court should grant certiorari specifically to disapprove the *Lessig* rule. This argument applies only to the attempt to monopolize claim. Thus, even if this Court agreed with petitioners' *Lessig* argument, it would not affect the other antitrust claims or the RICO claims.

Contrary to petitioners' assertion, the jury was instructed that McQuillan had to prove the following elements by a preponderance of the evidence to establish attempt to monopolize:

> 1. That the defendants had a specific intent to achieve monopoly power in the relevant market;
>
> 2. That the defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent;
>
> 3. That there was a dangerous probability that defendants could sooner or later achieve their goal of monopoly in the relevant market;

> 4. That the defendants' conduct occurred in or affected interstate commerce; and,
>
> 5. That the plaintiff was injured in its business or property by the defendants' exclusionary or restrictive conduct.

The jury was further instructed that "(i)f plaintiff has shown that defendants engaged in predatory conduct you may infer from the evidence the specific intent and the dangerous probability elements of the offense, without any proof of relevant market or the defendants' market power." This instruction was consistent with *Lessig*.

More importantly, the *Lessig* inference was unnecessary to the verdict on the attempt to monopolize claim because the jury found petitioners liable for monopolization as well. The jury was properly instructed in connection with that claim to define the relevant market and determine whether petitioners had market power in that market. Of course, these are issues of fact for the jury to determine. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962). By finding that defendants violated Section Two of the Sherman Act, the jury defined the market and found that defendants had monopoly power in that relevant market.[8] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Thus, the Ninth Circuit's citation of *Lessig* in its unpublished Memorandum Decision hardly creates

---

[8] Petitioners do not assert in their Petition (nor could they) that there was insufficient evidence to support the jury's finding on the monopoly claim. Sorbothane athletic shoe inserts were a single product submarket. Further, H-K (and then SI) was the only manufacturer of Sorbothane insoles in the United States. SI's market allocation agreement with Leyland further solidified SI's market power in the United States.

an appropriate opportunity for this Court to disapprove the *Lessig* rule. If this Court believes that the *Lessig* rule should be reviewed, it should do so in the context of a case where application of the rule affects the outcome.

C. The Evidence in This Case Disproves the Existence of a Legitimate *Copperweld* Issue.

Petitioners argue that this Court should grant certiorari because concerted activity between two wholly-owned subsidiaries of a common ultimate parent cannot violate the Sherman Act under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The *Copperweld* argument pertains only to the horizontal market allocation claim; the other antitrust claims either do not require concerted activity (monopolization and attempt to monopolize) or involved more than the two companies petitioners now claim are subsidiaries of a common parent (resale price maintenance and conspiracy to monopolize).

Copperweld held that a parent and wholly-owned subsidiary cannot conspire. Petitioners argue that the *Copperweld* reasoning extends to "two corporations ultimately owned by the same parent." However, *there was no evidence that SI and Leyland are subsidiaries owned by the same parent*. In fact, the evidence was that SI and Leyland are *not* sister corporations. Leyland is a British corporation not owned by BTR, Inc. (the grandparent of SI) or any of BTR, Inc.'s subsidiaries. Further, BTR, Inc. did not own shares of Leyland which, in turn, was a sole subsidiary of

BTR, Ltd., a mere holding company.[9] If petitioners had a valid defense based on the fact that SI and Leyland were commonly owned by the same parent, they could have (and should have) proved that relationship at trial. To the extent that there was evidence about the relationship of SI and Leyland,[10] it flatly contradicts the notion that the two companies were subsidiaries of a common parent.

Even if the evidence established some remote relationship between Leyland and SI, and even if the *Copperweld* rule extends beyond the parent/subsidiary situation, the uncontradicted evidence established that SI and Leyland did not function as part of a coordinated business enterprise.[11] SI's own evidence was that the 650 companies within the BTR family operate autonomously, *not* as a single economic enterprise and *not* under any common direction. Significantly, SI's sublicensor, BTR Development Services, Ltd., did not allocate any limited geographic market to SI, but rather directed SI to sell Sorbothane "in all world markets." Similarly, Leyland's license did not restrict it from selling into the United

---

[9] A chart acknowledged by BTR, Inc. President John Cahill as showing the BTR, Inc. family does not reflect any relationship between Leyland and either BTR, Inc., S.I. or H-K.

[10] Indeed, the only evidence of even a remote affiliation between Leyland and SI was a reference by Maurice Hiles, Sorbothane inventor and *not* an officer or director of any BTR company, that BTR, plc is a British Holding Company that owns all the shares of BTR Companies. Significantly, John Cahill – Chief Executive of BTR, plc by the time of trial – came from London to testify on behalf of petitioners and never testified about any relationship at all between SI and Leyland.

[11] *Copperweld* views the "coordinated activity" of a parent and its wholly-owned subsidiary as a single economic enterprise because the two have a complete unity of interest.

States. Had the ultimate BTR holding company (presumably BTR, plc) intended to divide up the world market between SI and Leyland, it would have done so in the sublicenses given to each company. Instead, the BTR organization (assuming it had the ability to give common direction) clearly intended that SI operate as an economic unit separate from Leyland and sell worldwide. Indeed, evidence relating to earlier transactions with Frelen and Nike showed that SI and Leyland in fact were competitors before they unilaterally allocated the world market. Such anticompetitive conduct is not permissible simply because somewhere upstream there may be a common holding company that owns the shares of corporate conspirators.

Thus, this case raises no legitimate *Copperweld* issue. The evidence disproves both common ownership of SI and Leyland and that they operated as a coordinated economic enterprise. The jury correctly rejected the *Copperweld* defense.

D. Antitrust Injury is a Legal Issue, Not a Factual Issue for the Jury; In Any Event, McQuillan Established Antitrust Injury as a Matter of Law.

Petitioners also urge that the District Court should have instructed the jury on antitrust injury and that the Ninth Circuit should have reversed under *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 110 S.Ct. 1884 (1990).[12] As

---

[12] Petitioners do not challenge (nor could they) the jury's factual conclusion that the destruction of McQuillan's business directly and proximately resulted from petitioners' *per se* antitrust violations.

petitioners themselves concede, the antitrust injury requirement is a standing issue and means that the plaintiff's injury must be the type the antitrust laws were designed to prevent.

Whether there is antitrust injury is a question of law for the court to decide after balancing policy factors. *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Assoc. General Contractors of California v. Calif. State Council of Carpenters*, 459 U.S. 519 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Indeed, petitioners fully recognized before trial that antitrust injury is a legal issue. The pre-trial order (signed by petitioners' counsel) identifies as "issues of law" the following:

> A. Does Sorboturf Enterprises have standing to complain of the alleged federal antitrust violations?
>
> B. Did Sorboturf Enterprises suffer any injury by reason of the alleged violations of the federal antitrust laws?
>
> C. Is Sorboturf Enterprises' alleged injury of the type that federal antitrust laws are designed to prohibit?

There was no counterpart to these issues in the separate and distinct listing of "issues of fact." If petitioners thought antitrust injury was a factual question requiring a jury instruction, they would have identified the issue in the pre-trial order as a fact to be litigated at trial.

It is difficult to imagine how a jury could be instructed on antitrust injury. The inquiry focuses on "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and

in providing a private remedy under Section 4." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 (1982). Petitioners do not quote the instruction they claim they requested. Nevertheless, do they seriously contend that a jury can determine whether a particular injury was in Congress' contemplation when it created a private remedy under the antitrust laws? That, obviously, is a legal issue for the court which here concluded there was antitrust injury.

In any event, McQuillan proved classic antitrust injury as a matter of law. She claimed and proved a single injury: The destruction of her business by the concerted refusal to sell her Sorbothane. This refusal facilitated petitioners' scheme to control Sorbothane prices. When a manufacturer, acting in concert with some of its distributors, eliminates another distributor in furtherance of a scheme to control prices, the resulting injury to the terminated distributor is antitrust injury as a matter of law. *United States v. General Motors Corporation*, 384 U.S. 127 (1966). *See also, Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) ["where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.' "]

McQuillan also prevailed on her horizontal market allocation claim, a separate and independent *per se* violation. After SI eliminated her source of Sorbothane, McQuillan sought an alternative source of Sorbothane. However, because of SI's "harmonious marketing arrangement" with Leyland, McQuillan had no alternative source of Sorbothane. McQuillan, a consumer and potential competitor, was unable to purchase Sorbothane

from a source that, but for the unlawful horizontal market allocation, would have been available to her. This is precisely the harm that the proscription on market allocations is designed to prevent.

Petitioners argue that the decision here is somehow inconsistent with *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. 1884 (1990) which held that *per se* conduct does not presumptively result in antitrust injury to any particular plaintiff. However, as discussed below, McQuillan affirmatively established that her business and ability to compete were destroyed when SI illegally eliminated her source of Sorbothane. This was classic antitrust injury because the elimination of McQuillan's source of Sorbothane resulted from a concerted refusal to deal in the form of (1) a group boycott in furtherance of the resale price maintenance scheme, and (2) a horizontal market allocation between SI and Leyland.[13] *Atlantic Richfield's* only significance is its elimination of a presumption that, given the evidence in this case, is superfluous.

In any event, *Atlantic Richfield* is factually inapposite. In *Atlantic Richfield*, a competitor (USA Petroleum Company) sued ARCO for encouraging ARCO's dealers to match the lower prices of independent gasoline dealers.

[13] In their Motion to Reconsider before the Ninth Circuit, petitioners lamely tried to characterize this as a "dealer substitution" case to thereby argue that McQuillan's termination was actually pro-competitive. However, McQuillan's claim is not based on SI's substitution of one regional distributor for another. Rather, the claim is based on SI's plan to replace the regional distributors collectively with one national distributor to control Sorbothane prices.

ARCO's maximum price fixing scheme reduced prices and increased ARCO's market share. USA asserted that the maximum price fixing scheme ruined many independents, thereby injuring competition. The District Court granted summary judgment in favor of ARCO on the price fixing claim on the basis that USA had failed to demonstrate antitrust injury. The District Court also concluded that USA could make no showing of predatory pricing because, given ARCO's market share and the ease of entry into the market, ARCO could not exercise market power.

The Ninth Circuit reversed, holding that vertical, nonpredatory, maximum price-fixing agreements could result in "antitrust injury" and that such injury is presumed to flow from *per se* conduct. This court reversed, holding that antitrust injury must be proven, not presumed, and that USA, as a matter of law, could not establish antitrust injury. Here, by contrast, McQuillan established paradigm antitrust injury as a matter of law without regard to any presumption. *Atlantic Richfield* does not support – much less mandate – the granting of certiorari in this case.

Therefore, this issue does not merit Supreme Court review. Antitrust injury is not a question for the jury and no instruction was necessary or appropriate. In any event, McQuillan established classic antitrust injury as a matter of law.

CONCLUSION

Petitioners have not raised a single issue that merits a grant of certiorari by this Court. Accordingly, this Court should deny the Petition for Writ of Certiorari.

DATED: July 26, 1991

Respectfully submitted,

JEFFREY M. SHOHET
GRAY, CARY, AMES & FRYE
Attorneys for Respondents Shirley McQuillan and Larry McQuillan, d/b/a Sorboturf Enterprises

Supreme Court, U.S.
FILED
AUG 2 1991
OFFICE OF THE CLERK

No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., BTR, INC.,
HAMILTON-KENT MANUFACTURING COMPANY,
and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN F. BOMSTER*
JOHN A. TARANTINO
W. JAMES McKAY
ADLER POLLOCK & SHEEHAN
INCORPORATED
2300 Hospital Trust Tower
Providence, Rhode Island 02903
(401) 274-7200
Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REASONS FOR GRANTING THE WRIT 2

I. Endorsement or Approval of the Unique and Bizarre *Lessig* Rule Is Necessary to Sustain the Result Below 3

II. The Ninth Circuit Decision Squarely Presents the *Copperweld* Issue 5

III. The Failure to Charge on Antitrust Injury in Accordance with *Atlantic Richfield* Is Reversible Error 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990) 6

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 5, 6

E.W. French & Sons, Inc. v. Gen'l Portland, Inc., 885 F.2d 1392 (9th Cir. 1989) 3

Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979) 6

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 3, 4, 5

STATUTES AND RULES

Supreme Court Rule 10 2

15 U.S.C. § 1 ..... 5, 8

15 U.S.C. § 2 ..... 4, 5

No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN, d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners, Sorbothane, Inc., BTR, Inc., Hamilton-Kent Manufacturing Company, and Kenneth M. Leighton, Sr. (hereinafter collectively referred to as "SI"), have filed a Petition for a Writ of Certiorari ("Petition") which presents three important questions under the federal antitrust laws. Respondents, Shirley McQuillan and Larry McQuillan, individually and d/b/a Sorboturf Enterprises (collectively "McQuillan"), filed their Opposition to Petition for a Writ of Certiorari ("Opposition") on July 26, 1991. SI now files a brief Reply to correct misleading, and

in some instances, materially inaccurate characterizations, references and arguments in the Opposition.

REASONS FOR GRANTING THE WRIT

Before addressing the issue-specific arguments made by McQuillan, a general theme which runs throughout the Opposition should be addressed. Specifically, McQuillan would have the Court believe that it would be a meaningless gesture to consider the antitrust issues raised by SI because reversal would not alter the outcome below. The rationale the Opposition advances is that because SI was also found liable at trial on other claims, a reversal on the antitrust issues raised by SI would leave the balance of the judgment intact.

McQuillan's suggestion is both irrelevant and inaccurate. First, the issues raised by SI are important and timely, and call upon this Court to resolve splits in the Circuit Courts of Appeals as well as to clarify the full reach of leading antitrust opinions of this Court. As such, the questions presented fall four-square within the relevant factors for this Court to consider under Supreme Court Rule 10.

Second, SI challenged on appeal the propriety of the judgment on the other claims as well. However, the Ninth Circuit, rather than address those issues in its decision, affirmed solely on the selected antitrust claims now raised by SI, and expressly stated that "it is not necessary for the Court to address any of those [other] issues." Appendix A to Petition at 31.

A reversal on the antitrust issues before the Court would, at a minimum, require the Ninth Circuit to consider the merits of SI's other points of appeal. Given the seriousness of the issues raised on the claims which the Ninth Circuit disposition avoided,[1] McQuillan should not presume that she would have prevailed on appeal on those claims which the Ninth Circuit expressly declined to reach.

SI now turns to specific points concerning the three questions it has asked this Court to address.

I. ENDORSEMENT OR APPROVAL OF THE UNIQUE AND BIZARRE *LESSIG* RULE IS NECESSARY TO SUSTAIN THE RESULT BELOW.

The first SI issue is the questionable validity of the multiple inferences uniquely allowed in the Ninth Circuit on attempt to monopolize claims under the law established by *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). As noted in the Petition,

---

[1] By way of illustration, the trial court, over objection, charged that the jury could award compensatory damages for unfair competition in violation of Section 17200 of the California Business and Professions Code, when clearly only restitutionary damages are permitted. *E.W. French & Sons, Inc. v. Gen'l Portland, Inc.*, 885 F.2d 1392, 1401-02 (9th Cir. 1989). The trial court also, over objection, allowed a claim of bad faith denial of the existence of a certain contract to go to the jury where McQuillan admitted she had not proved the existence of that contract. Also, the RICO claims were allowed to go to the jury over SI's objection, notwithstanding the absence of, *inter alia*, investment injury and sufficient continuity to demonstrate a pattern of racketeering activity.

the *Lessig* rationale has been universally rejected outside the Ninth Circuit.

Rather than attempt to defend the *Lessig* rationale, McQuillan argues instead that the jury found SI liable for monopolization as well as for an attempt to monopolize. From this alleged fact, McQuillan reasons that the *Lessig* chain of inferences was unnecessary in that the higher standard for actual monopolization was met.

McQuillan is wrong. The special verdict form upon which the jury returned its verdict did not ask the jury to make separate findings on the various Section 2 claims, 15 U.S.C. §2. Rather, a consolidated question was posed to the jury: "Do you find by a preponderance of the evidence that any of the following defendants violated Section 2 of the Sherman Act by monopolizing, attempting to monopolize, and/or conspiring to monopolize the market for Sorbothane products?"[2]

From this question, it is impossible to argue, much less conclude, that the jury's affirmative answer necessarily represents a finding that SI engaged in actual monopolization. To the contrary, one can only conclude that if, as SI argues, the jury were improperly instructed on any element of the issues presented to it (which were encompassed within that portion of the special verdict form), then the answer to that question cannot be sustained on appeal.

---

[2] SI proposed that each of substantive offenses alleged under Section 2 be the subject of separate questions to the jury. The trial court declined to use SI's proposed form.

Having insisted on a charge over SI's objection that the jury could find a violation of Section 2 of the Sherman Act under the *Lessig* rule, McQuillan cannot now claim that it was harmless error to so charge the jury. The improper charge infects the special verdict and precludes McQuillan from dodging the *Lessig* bullet.[3]

II. THE NINTH CIRCUIT DECISION SQUARELY PRESENTS THE *COPPERWELD* ISSUE.

The second SI issue is that the horizontal market allocation claim under Section 1 of the Sherman Act, 15 U.S.C. §1, cannot stand where the only entities alleged to have acted in concert were related subsidiaries of a common ultimate parent under this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The Opposition claims that there was no factual showing of corporate relatedness such as to place the *Copperweld* issue squarely before this Court.

Again, McQuillan's argument is wrong. The argument is factually inaccurate, and it ignores the express language of the Ninth Circuit decision itself assessing the record below. The Ninth Circuit defined its factual predicate in rejecting *Copperweld* as follows: "While the evidence *did show that S.I. and Leyland were licensed by a BTR family member and that they are corporations existing under a family of companies controlled by BTR, PLC*, a U.K.

---

[3] SI also notes that, as an errata to the Petition's argument concerning *Lessig*, the sentence on page 10 of the Petition which reads, "Rather, the antitrust laws were designed by Congress to *project* competition" should read " . . . to *protect* competition."

Holding Company, the evidence was to the effect that both corporations operated autonomously." Appendix to Petition at 13 (emphasis added).

The *Copperweld* issue presented by SI is squarely before this Court. It is not dependent upon a reexamination of the factual record. The Ninth Circuit defined the playing field upon which the *Copperweld* issue would be contested, a playing field occupied by two subsidiaries of a common ultimate parent.

The issue presented to this Court is whether concerted activity between these two wholly-owned subsidiaries of a common ultimate parent violates Section 1. The Ninth Circuit accepted the fact of this relationship, but incorrectly engaged in a further examination of the factual niceties of the subsidiaries' operations, relying on pre-*Copperweld* cases such as *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979). This further factual exploration ignores the clear import of *Copperweld* which ended the *Las Vegas Sun*-type analysis and rested its holding of a lack of a plurality of actors on the fact of corporate relatedness, and nothing more.

III. THE FAILURE TO CHARGE ON ANTITRUST INJURY IN ACCORDANCE WITH *ATLANTIC RICHFIELD* IS REVERSIBLE ERROR.

The third SI issue is that the jury was not properly instructed on the necessity of finding antitrust injury, thereby permitting such injury to be presumed in violation of the clear mandate in *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990). McQuillan argues that antitrust injury is a question of law, but does not

suggest the issue raised by SI is inappropriate for the issuance of a writ. Rather, McQuillan seeks to avoid review on certiorari by making three diversionary suggestions. None withstand scrutiny.

First, McQuillan claims that SI conceded below that the issue of antitrust injury is a question of law by virtue of certain "issues of law" listed in the Pre-Trial Order. The fact and record is that SI specifically requested that the trial court charge, as an element of the antitrust claims, on the necessity for proving antitrust injury. The Pre-Trial Order, as a jointly-prepared statement of all potential matters for consideration at trial to be used as a road map by the trial court,[4] does not relieve the trial court of its duty to correctly charge the jury on issues of the case ultimately sent to the jury when expressly called upon to do so.

Second, McQuillan claims that the record demonstrates that antitrust injury was established as a matter of

---

[4] By way of illustration, SI would note that other "issues of law" which are clearly fact issues for the jury were listed in the Pre-Trial Order (signed by McQuillan's counsel), including:

A. Did any defendant violate section 2 of the Sherman Act, 15 U.S. Code, by monopolizing, attempting to monopolize, or conspiring to monopolize the market for sorbothane products?

B. Did any defendant have monopoly power in the relevant market?

C. Did any defendant have the specific intent to control prices or destroy competition in the relevant market?

law.[5] But if that had been true, the trial court would have instructed the jury to that effect. In fact, there was no finding made on the existence of antitrust injury, and SI's request for an instruction requiring that the jury find antitrust injury as a predicate for liability was denied without explanation (or, indeed, contrary argument by McQuillan).

Third, McQuillan is not candid with this Court by suggesting that SI's Petition only "claims" to have requested a jury instruction on antitrust injury, and chides SI for not quoting a hard proposed instruction as a predicate for the grounds for the Petition. In fact, an explicit request was made by SI, and rejected by the trial court, that the antitrust injury element be included in the jury instructions as a necessary element of McQuillan's proof.[6]

---

[5] As an aside, it should be noted that the attempt to demonstrate the alleged existence of antitrust injury as a matter of law by discussing the resale price fixing claim is misleading and unfair. This McQuillan claim was not reached or reviewed by the Ninth Circuit and is not, therefore, in issue on this Petition.

[6] On the Section One claim, SI requested that the trial court add "as a fourth element, there has to be an antitrust injury." On the monopolization claim, SI again requested the addition of "an initial element that requires that it be an antitrust injury she suffered." Similarly, for the attempt to monopolize claim, SI again requested that the trial court "add as a sixth element antitrust injury."

CONCLUSION

For the foregoing reasons, and those presented in the Petition, SI respectfully requests that the Supreme Court issue a Writ of Certiorari to the Ninth Circuit to rectify the clear errors made by that Court on the questions presented.

Respectfully submitted,

JOHN F. BOMSTER*
JOHN A. TARANTINO
W. JAMES MCKAY
ADLER POLLOCK & SHEEHAN
INCORPORATED
2300 Hospital Trust Tower
Providence, Rhode Island
(401) 274-7200
Counsel for Petitioners

*Counsel of Record

(4) (4)

Nos. 91-10 and 91-32

Supreme Court, U.S.
FILED
FEB 27 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

SPECTRUM SPORTS, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN AND LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES

SORBOTHANE, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. JAMES
Deputy Assistant Attorney General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
JAMES W. LOWE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether wholly owned subsidiaries of a common corporate parent may conspire with each other for purposes of the Sherman Act.

2. Whether the jury was correctly instructed that it could find liability for attempted monopolization under Section 2 of the Sherman Act on the basis of predatory conduct by the defendant, without proof of a relevant market or the defendant's market power.

3. Whether a private antitrust plaintiff establishes antitrust injury merely by showing actual injury resulting from a per se violation of Section 1 of the Sherman Act or attempted monopolization in violation of Section 2 of the Sherman Act.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Advanced Health-Care Serv., Inc. v. *Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990)	13
American Key Corp. v. *Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985)	9
Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990)	6, 11, 12, 17
Bright v. *Moss Ambulance Service*, 824 F.2d 819 (10th Cir. 1987)	9
CVD v. *Raytheon Corp.*, 769 F.2d 842 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986)	9
City of Mt. Pleasant v. *Associated Elec. Co-op.*, 838 F.2d 268 (8th Cir. 1988)	13
Cohen v. *Primerica Corp.*, 709 F. Supp. 63 (E.D.N.Y. 1989)	13
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984)	4, 6, 7, 8, 9, 11
Datagate, Inc. v. *Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991)	16
Directory Sales Management Corp. v. *Ohio Bell Tel. Co.*, 833 F.2d 606 (6th Cir. 1987)	13
FMC Corp. v. *Manitowoc Co.*, 654 F. Supp. 915 (N.D. Ill.), aff'd, 835 F.2d 1411 (Fed. Cir. 1987)	9
General Indus. Corp. v. *Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987)	9
Greenwood Util. Comm'n v. *Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985)	13
Griffin v. *United States*, 112 S. Ct. 466 (1991)	11
Harold Friedman, Inc. v. *Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978)	9

Cases—Continued: Page

International Distrib. Centers v. *Walsh Trucking Co.*, 812 F.2d 786 (2d Cir.), cert. denied, 482 U.S. 915 (1987) 9
Janich Bros. v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978) 10
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) 4, 7
Lake Communications v. *ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984) 13
Las Vegas Sun, Inc. v. *Summa Corp.*, 610 F.2d 614 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980) 4, 7
Lektro-Vend Corp. v. *Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982) 9
Lessig v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964) 5, 6, 10
Monsanto Co. v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984) 11
Multiflex v. *Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) 9
Neumann v. *Reinforced Earth Co.*, 786 F.2d 424 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986) 9
Oahu Gas Service, Inc. v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988) 15
Odishelidze v. *Aetna Life & Cas. Co.*, 853 F.2d 21 (1st Cir. 1988) 13
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) 11
Thurman Indus. v. *Pay 'N Pak Stores*, 875 F.2d 1369 (9th Cir. 1989) 15
United States v. *Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981) 9
Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) 9
White Bag v. *International Paper*, 579 F.2d 1384 (4th Cir. 1974) 9

Cases—Continued: Page

Wilcox v. *First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987) 13

Statutes and rule:

Clayton Act, 15 U.S.C. 12 *et seq.*:
§ 3, 15 U.S.C. 14 2-3
§ 4, 15 U.S.C. 15 ..... 3, 4, 12
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962(a) 3
18 U.S.C. 1962(b) 3
18 U.S.C. 1962(c) 3
18 U.S.C. 1962(d) 3
18 U.S.C. 1964(c) 3
Sherman Act, 15 U.S.C. 1 *et seq.*:
§ 1, 15 U.S.C. 1 ..... *passim*
§ 2, 15 U.S.C. 2 ..... 2, 3, 4, 5, 9, 10, 11, 12, 15, 16
Cal. Cartwright Act, Cal. Bus. & Prof. Code (West 1987 & Supp. 1992):
§ 16750 3
§ 16750(a) 3
Cal. Bus. & Prof. Code (West 1987):
§ 17200 3
9th Cir. R. 36-3 12-13

Miscellaneous:

7 P. Areeda, *Antitrust Law* (1986) 8

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-10

SPECTRUM SPORTS, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN AND LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES

No. 91-32

SORBOTHANE, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

1. Sorbothane is a patented elastic polymer useful for its shock-absorbing characteristics. Respondents Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, were regional distributors of products made

from sorbothane from 1981 to mid-1983. Pet. App. A3-A7.[1] In addition, Shirley McQuillan was involved in efforts to develop equestrian products made from sorbothane. Petitioner BTR, Inc., controlled the patent rights to sorbothane. BTR initially licensed petitioner Hamilton-Kent Manufacturing Company (Hamilton-Kent) to manufacture sorbothane in the United States. In 1982, petitioner Sorbothane, Inc., assumed Hamilton-Kent's sorbothane business. Pet. App. A3. At all relevant times, BTR owned, directly or indirectly, both Hamilton-Kent and Sorbothane. *Ibid.* Petitioner Kenneth M. Leighton, Sr., served as president of Hamilton-Kent until the creation of Sorbothane, at which time he became president of that company.[2] *Ibid.* Petitioner Kenneth B. Leighton, Jr., Leighton Sr.'s son, is a co-owner of petitioner Spectrum Sports, Inc. (Spectrum). At all relevant times, Spectrum was a distributor of sorbothane products.[3] *Ibid.*

In 1983, Sorbothane, Inc., notified respondents that it would no longer sell them sorbothane or sorbothane products. Shortly thereafter, Spectrum Sports became the national distributor of sorbothane athletic products. Respondents attempted unsuccessfully to obtain sorbothane from a British firm, Leyland and Birmingham (Leyland), which held a license to manufacture and sell sorbothane without territorial restriction. Pet. App. A4.

2. Respondents sued petitioners seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 3 of the Clayton Act, 15

---

[1] Unless otherwise noted, references are to the appendix to the petition for a writ of certiorari in No. 91-10.

[2] Sorbothane, Hamilton-Kent, BTR, Inc., and Kenneth M. Leighton, Sr., are the petitioners in No. 91-32. In this brief, they are collectively referred to as the "Sorbothane petitioners."

[3] Kenneth B. Leighton, Jr., and Spectrum Sports, Inc., are the petitioners in No. 91-10. In this brief, they are referred to as the "Spectrum petitioners."

U.S.C. 14.[4] At the conclusion of the trial, the jury found by special verdict that the Sorbothane petitioners had engaged in resale price fixing and horizontal territorial market allocation of sorbothane products in violation of Section 1 of the Sherman Act, and had monopolized, attempted to monopolize, or conspired to monopolize the market for sorbothane products, in violation of Section 2 of the Sherman Act.[5] The jury found that the Spectrum petitioners were not liable for any Section 1 violation, but did find them liable under Section 2.[6] The jury awarded respondents $1,743,000 in compensatory damages on all claims, and awarded an additional $500,000 in punitive damages, which respondents later waived. The district court trebled the compensatory damages upon entry of judgment under Section 4 of the Clayton Act, 15 U.S.C. 15, RICO, 18 U.S.C. 1964(c), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1992), and awarded an additional $912,032.50 in attorneys' fees pursuant to Section 4 of the Clayton

---

[4] Respondents also alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (b), (c) and (d), as well as fraud, breach of contract, interference with prospective business advantage, bad faith denial of the existence of an oral contract, conversion, and violations of California's unfair competition law, Cal. Bus. & Prof. Code § 17200 (West 1987), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750 (West 1987 & Supp. 1992). See R.E. 1-47 (Second Amended Complaint).

[5] The jury also found that the Sorbothane petitioners were liable for all the alleged RICO and state law violations. The jury further found that Sorbothane or Hamilton-Kent was the agent or alter ego of BTR. Special Verdict Form I-X, XIV-XVIII.

[6] The jury found that the Spectrum petitioners were liable for interference with prospective business advantage and for violations of California's unfair competition law and of Sections 1962(b), (c) and (d) of RICO, but were not liable for fraud or for violations of the Cartwright Act or Section 1962(a) of RICO. Special Verdict Form II, VIII-IX, XIV-XVIII.

Act. All petitioners filed motions for judgment notwithstanding the verdict or for a new trial, which were denied by the district court. Pet. App. A2, A30-A31; 91-32 Pet. App. 35-36; Special Verdict Form I-XIX.

3. The Sorbothane and Spectrum petitioners appealed, and the Ninth Circuit affirmed in an unpublished memorandum decision. Pet. App. A1-A28. The court of appeals found a sufficient basis for the Sherman Act Section 1 market allocation claim against the Sorbothane petitioners, Pet. App. A8-A12, and for the Section 2 verdict as to the Spectrum petitioners. Pet. App. A15-A22. Because the jury found the same damages on all the claims against petitioners, the court noted that affirming a single trebled claim against each petitioner was sufficient to support the verdict. The court of appeals thus declined to address petitioners' assertions regarding the other substantive violations found by the jury. Pet. App. A27-A28.

a. The Sorbothane petitioners contended that, under this Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), Sorbothane and Leyland could not have conspired to allocate the market for sorbothane for purposes of Section 1 of the Sherman Act because both corporations are wholly owned direct or indirect subsidiaries of a single corporate parent. The court rejected that contention, concluding that Sorbothane and Leyland, while "existing under a family of companies controlled by BTR, PLC," nonetheless operated "autonomously." Pet. App. A10. Citing *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951), and the Ninth Circuit's own pre-*Copperweld* decision in *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980), the court held that common ownership and control does not prevent members of a corporate family from conspiring in violation of the antitrust laws where those corporate family members operate autonomously. Pet. App. A11.

b. The court of appeals noted that the jury had not specified whether it found the defendants liable under Section 2 of the Sherman Act for monopolizing, attempting to monopolize, or conspiring to monopolize. Pet. App. A15. The court asserted that the verdict must stand if the evidence was sufficient to support any of the three theories (*ibid.*), and proceeded to consider only whether petitioners could properly have been found liable for attempting to monopolize. The court rejected the Spectrum petitioners' argument that the Section 2 claim must fail because there was no evidence that they intended to injure competition and no evidence of market power that could lead to the conclusion that any of the petitioners were likely to succeed in monopolizing a relevant market. Relying on its decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964), the court held that "if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower." Pet. App. A19. The court concluded (Pet. App. A21):

> There is sufficient evidence from which the jury could conclude that [the Sorbothane petitioners] and [the Spectrum petitioners] engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power.

c. Finally, the court rejected petitioners' contention that the district court erred in failing to instruct the jury that respondents were required to show antitrust injury and in failing to grant JNOV in the absence of any such showing. The court stated that horizontal market allocations and attempts to monopolize are treated as per se

violations of the Sherman Act, and that per se violations are presumed to cause injury to competition. Pet. App. A22. The court then held that "[t]he jury was properly instructed on the antitrust violations and there was sufficient evidence in the record to show that [respondents were] injured as a result of the defendants' conduct." *Ibid.* The court of appeals did not refer to this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990), which was decided after briefing and oral argument but prior to the court of appeals' decision in this case.

Although the court of appeals denied petitioners' request for rehearing and suggestion for rehearing en banc, the panel amended its opinion to delete a statement that petitioners had failed to object to the instruction incorporating the *Lessig* holding. Pet. App. A32-A33.

DISCUSSION

1. The court of appeals' opinion contains three manifest errors in legal analysis. First, the court's analysis of the intra-enterprise conspiracy issue is inconsistent with the rationale of *Copperweld Corp.* v. *Independence Tube Corp.*, *supra*. Second, the court's application of *Lessig* v. *Tidewater Oil Co.*, *supra*, perpetuates an unsound Ninth Circuit doctrine that has been rejected by every other court of appeals. Third, the court's handling of the antitrust injury issue ignores this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, *supra*. Remarkably, the court of appeals chose not to publish its decision in this multi-million dollar case, even though it broke new legal ground on the *Copperweld* issue and ignored controlling Supreme Court precedent on the antitrust injury issue.

a. *First.* The court of appeals concluded that wholly owned subsidiaries of a common corporate parent can conspire for purposes of Section 1 of the Sherman Act if

the subsidiaries operate autonomously. The Sorbothane petitioners correctly argue that the court's conclusion conflicts with the rationale of *Copperweld*. The Court reasoned in *Copperweld* that the Sherman Act's prohibition of concerted activity in restraint of trade encompasses only arrangements in which "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." 467 U.S. at 769. Coordination between a corporation and its wholly owned subsidiary does not fall within that prohibition because "[t]heir objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id.* at 771.

In concluding that wholly owned subsidiaries of a common parent can conspire with each other for purposes of Section 1, the court of appeals relied (Pet. App. A11) on dicta from *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons* suggesting that the intra-enterprise conspiracy doctrine applies where defendants "hold themselves out as competitors." 340 U.S. at 215. This Court expressly repudiated that language in *Copperweld*. 467 U.S. at 763-764. In addition, *Copperweld* rejected, as applied to a parent and a wholly owned subsidiary, the "so-called 'single entity' test" adopted in cases such as *Las Vegas Sun, Inc.* v. *Summa Corp.*, *supra*, the other decision on which the court of appeals relied in this case. See 467 U.S. at 772 n.18. The Court observed in *Copperweld* that criteria measuring the "separateness" of a wholly owned subsidiary "simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Ibid.*

There is no reason to apply a different analysis to coordination between two wholly owned subsidiaries of the

same corporate parent. See 7 P. Areeda, *Antitrust Law* ¶ 1464f, at 245-246 (1986). If each subsidiary shares the ultimate interests of the same corporate parent, the ultimate interests of the subsidiaries must also be identical, and they are thus part of a single economic unit. As a result, they are squarely embraced within this Court's reasoning in *Copperweld* that efficiencies or other advantages achieved through utilization of organizational options within a single wholly owned enterprise are a legitimate means of competition, rather than an element of a Sherman Act violation. 467 U.S. at 772-774. And "[a]ny anticompetitive activities of [the enterprise] * * * may be policed adequately" under "§ 2 of the Sherman Act and § 5 of the Federal Trade Commission Act." 467 U.S. at 777. Consequently, the court of appeals erred in approving an instruction that allowed the jury to find a conspiracy among affiliated corporations unless defendants establish that they function as a single economic enterprise. See Pet. App. A11; 91-32 Pet. 11-12 n.11.[7]

b. *Second.* Both sets of petitioners challenge the court of appeals' reliance on the *Lessig* rule to uphold a jury instruction allowing a finding of attempted monopolization without consideration of a relevant market or proof of a likelihood that actual monopolization will result. We agree with petitioners that the district court's *Lessig* instruction was erroneous.[8]

---

[7] This case does not present the question of corporate affiliations involving less than one hundred percent ownership. The court of appeals relied on evidence that the affiliated corporations operated autonomously (Pet. App. A11) and did not discuss the degree of affiliation. The jury instructions allowed the jury to find an intra-enterprise conspiracy even if wholly owned corporations were involved and, to the extent that the record contains evidence on the corporate relationships, it indicates that the ownership interests at issue involved complete ownership. See Tr. 962, 1676-1684.

[8] The district court instructed the jury that "if the plaintiff has shown that the defendant engaged in predatory conduct, you may

This Court has recognized that "[t]o establish * * * attempt to monopolize * * * it [is] necessary to appraise the exclusionary power * * * in terms of the relevant market." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). See also *Copperweld*, 467 U.S. at 767 ("The conduct of a single firm * * * is unlawful only when it threatens actual monopolization."). Every court of appeals except the Ninth Circuit holds that proving an attempt to monopolize requires proving a dangerous probability of monopolization of a relevant market.[9]

The decisions of the other courts of appeals are correct. The danger that conduct will create monopoly power can be evaluated only in the context of a relevant market. Market definition in Section 2 cases is the process of identifying a product or group of products and a geographic area in which a hypothetical monopolist could charge a price significantly higher than the price that would prevail in a competitive market. If a seller has a

---

infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing power." Pet. App. A20.

[9] See, *e.g.*, *CVD* v. *Raytheon Corp.*, 769 F.2d 842, 851 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *International Distrib. Centers* v. *Walsh Trucking Co.*, 812 F.2d 786, 790-791 (2d Cir.), cert. denied, 482 U.S. 915 (1987); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978); *White Bag* v. *International Paper*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Multiflex* v. *Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *United States* v. *Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Bright* v. *Moss Ambulance Serv.*, 824 F.2d 819, 824 (10th Cir. 1987); *American Key Corp.* v. *Cole Nat'l Corp.*, 762 F.2d 1569, 1579-1581 (11th Cir. 1985); *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 428-429 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986); *FMC Corp.* v. *Manitowoc Co.*, 654 F. Supp. 915, 936 (N.D. Ill.), aff'd, 835 F.2d 1411 (Fed. Cir. 1987).

monopoly over a product or geographic area that is too narrowly drawn to constitute a market, any attempt by the seller to charge a monopoly price will prove unprofitable because too many consumers will shift to substitute products or sellers. Thus, a seller who attempts to monopolize something narrower than a relevant market cannot cause significant economic harm.

Before this Court decided *Walker Process* and *Copperweld*, however, the Ninth Circuit "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize." *Lessig*, 327 F.2d at 474. In its view, "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" *Ibid.* It added that "the specific intent [to monopolize] itself is the only evidence of dangerous probability the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." *Ibid.* Following this reasoning, the Ninth Circuit in a number of cases has allowed a double inference in attempt to monopolize cases: a finder of fact may use evidence of predatory conduct to infer specific intent to monopolize, and then may infer a dangerous probability of success from the evidence of intent. See, *e.g.*, *Janich Bros.* v. *American Distilling Co.*, 570 F.2d 848, 854 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978).

The effect of the double inference sanctioned by *Lessig* is to eliminate the element of dangerous probability of actual monopolization from an attempted monopolization case. That result blurs the fundamental distinction between unilateral conduct and concerted action incorporated in Sections 1 and 2 of the Sherman Act. Concerted action that constitutes an unreasonable restraint of trade is condemned under Section 1 without further inquiry into the likelihood of actual monopolization. But the law mandates a more cautious approach to single firm con-

duct. See *Copperweld*, 467 U.S. at 767; see also *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). Unilateral conduct that does not threaten actual monopolization is not subject to the Sherman Act "[i]n part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects." *Copperweld*, 467 U.S. at 767-768. The Ninth Circuit's *Lessig* rule, by allowing an inference of dangerous probability based solely on conduct, undercuts that distinction and permits the imposition of liability for unilateral conduct that has no ultimate anticompetitive effect.[10]

c. *Third.* Both sets of petitioners challenge the court of appeals' failure to address the question of antitrust injury in light of this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990). In *Atlantic Richfield*, the Court rejected the Ninth Circuit's conclusion in that case that antitrust injury could be presumed from a finding of a per se violation of the Sherman Act.

---

[10] The district court gave the jury a *Lessig* instruction on attempted monopolization, and the jury did not specify whether its finding of liability under Section 2 of the Sherman Act was based on monopolization, attempted monopolization, or conspiracy to monopolize. Thus, it is possible that the verdict as to Section 2 rested on a finding of attempted monopolization, rather than monopolization or conspiracy to monopolize. The Ninth Circuit discussed only attempted monopolization, asserting that the Section 2 verdict must stand if any one of the three theories could support liability. But this Court has held that, if one of the alternative grounds for a general verdict is legally insufficient, the verdict may not be affirmed. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962). *Cf. Griffin* v. *United States*, 112 S. Ct. 466 (1991) (upholding general verdict where one of the possible bases of conviction was supported by inadequate evidence, and distinguishing factual insufficiency from legal inadequacy). Accordingly, the validity of the *Lessig* instruction is presented by these petitions.

> The *per se* rule is a presumption of unreasonableness based on "business certainty and litigation efficiency." * * *
>
> The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief.

495 U.S. at 342. Accordingly, a plaintiff seeking relief under Section 4 of the Clayton Act for alleged violations of the Sherman Act, whether or not those violations would be viewed as per se violations, must show antitrust injury.

The court of appeals did not refer to *Atlantic Richfield*, which was decided after briefing and oral argument of this case in the court of appeals but before the court issued its opinion. Instead, the court's decision blurs the distinction between whether the defendants' alleged conduct causes *injury to competition* and whether the harm claimed by the plaintiffs constitutes *antitrust injury*. The court simply held that, because all petitioners had been found to have committed per se violations of Section 1 and Section 2, "[i]njury to competition is presumed to follow from the conduct proscribed by these Sections. *United States* v. *Topco*, [405 U.S. 596 (1972)]; *Walker* v. *U-Haul Co. of Mississippi*, 747 F.2d 1011 (5th Cir. 1984)." Pet. App. A22. The court failed to modify its analysis of this issue on rehearing, although this Court's opinion in *Atlantic Richfield* was brought to its attention.

2. Although the court of appeals made no fewer than three legal errors, it is not clear that this case warrants plenary review. As we mentioned before, the decision of the court of appeals is unpublished. Although antitrust practitioners may be aware of the court of appeals' decision, it lacks any precedential effect. See Ninth Circuit

Rule 36-3 (unpublished memorandum decisions "shall not be regarded as precedent and shall not be cited to or by this court or any district court in the Ninth Circuit * * * except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel"). In addition, more specific considerations suggest caution in granting plenary review of any of the questions presented.

a. As to the *Copperweld* issue, we are aware of no published decision holding that wholly owned subsidiaries of a common parent can conspire with each other for purposes of Section 1. The Ninth Circuit's published rulings since *Copperweld* have either reserved the issue, see *Wilcox* v. *First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 527 (1987), or suggested that *Copperweld* should apply to corporate families including multiple wholly owned subsidiaries, see *Lake Communications* v. *ICC Corp.*, 738 F.2d 1473, 1480 (1984). And the four other circuits that have considered the question have had little difficulty concluding that the reasoning of *Copperweld* applies in this situation. *Odishelidze* v. *Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Advanced Health-Care Serv., Inc.* v. *Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Greenwood Util. Comm'n* v. *Mississippi Power Co.*, 751 F.2d 1484, 1496 (5th Cir. 1985); *Directory Sales Management Corp.* v. *Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987). See also *Cohen* v. *Primerica Corp.*, 709 F. Supp. 63, 65 (E.D.N.Y. 1989). Cf. *City of Mt. Pleasant* v. *Associated Elec. Co-op.*, 838 F.2d 268, 274-277 (8th Cir. 1988) (under *Copperweld*, a group of related corporations comprising part of a rural electric cooperative are a single economic entity and cannot be found to have conspired).

In addition, the exact relationship among the BTR subsidiaries is less than elaborately developed in the record. Petitioners appear to have presented no evidence at trial on this issue; the only testimony to the relationship came from two of respondents' witnesses, over the objec-

tion of counsel for the Sorbothane petitioners. Tr. 962, 1676-1684. Neither witness professed any expertise in the corporate structure of the BTR companies and one, Laurene Heinsohn, conceded that her knowledge of the BTR corporate structure was hearsay. Tr. 962. Consequently, although the jury instruction upheld by the court of appeals allowed the jury to ignore the affiliation between subsidiaries if it concluded that they operated autonomously, the jury may have found a conspiracy because it did not believe that petitioners presented sufficient evidence of their affiliation.[11]

The panel's reasoning with respect to the *Copperweld* issue is nevertheless troubling. *Copperweld* goes to the heart of the manner in which families of related businesses conduct their operations. Thus, even an unpublished opinion improperly limiting *Copperweld* could have

---

[11] An additional uncertainty arises because the jury found the Sorbothane petitioners liable for two separate Section 1 violations—a horizontal agreement to divide markets and a vertical agreement to fix resale prices. Special Verdict Form XI-XII. It is difficult to determine whether the *Copperweld* error infected the jury's verdict on the resale price fixing claim. And the resale price fixing verdict alone would suffice to support the entire award of damages, which was the only relief awarded.

The jury found that the Sorbothane petitioners, but not the Spectrum petitioners, had engaged in resale price fixing. Special Verdict Form XI. Thus the jury's verdict, standing alone, would suggest that the jury thought the Sorbothane petitioners had conspired with themselves. But the district court instructed the jury that "resale price fixing * * * is an agreement between firms, at different levels of a chain of distribution to set the resale prices or price ranges for production." Tr. 4328. This raises the possibility that the jury concluded that the Sorbothane petitioners (the manufacturers) conspired to fix resale prices with independent distributors that were not named as defendants in this lawsuit. If that is so, the Section 1 verdict could stand despite the court's misapplication of *Copperweld*. The issue is further complicated, however, by the fact that IEM, one of Sorbothane's principal unaffiliated distributors, distributed medical products rather than athletic products. See Pet. App. A5-A6.

the effect of deterring lawful, procompetitive behavior by commonly owned firms. Consequently, although we do not believe the *Copperweld* issue merits plenary review, we believe it would be appropriate, should the Court wish to do so, summarily to reverse the decision of the court of appeals to the extent that it rests on a holding that wholly owned subsidiaries of a common parent can conspire with each other.

b. The *Lessig* doctrine conflicts with the law of every other circuit and has long been a source of confusion in attempted monopolization cases in the Ninth Circuit. We believe that the *Lessig* doctrine is incorrect, but it remains an established part of the law of the Ninth Circuit. The unpublished opinion in this case does not alter the state of the law.

At the same time, the court of appeals applied *Lessig* in a particularly expansive way by upholding the Section 2 verdict as to the Spectrum petitioners, who were not found to have committed a per se violation of Section 1 of the Sherman Act. That is quite troubling. In its *published* decisions, however, the Ninth Circuit has indicated that, in the absence of predatory or per se illegal conduct, "[m]arket analysis is essential because intent to exclude competition or control prices cannot exist in [a] vacuum; such intent only may exist within the framework of a definable market". *Thurman Indus.* v. *Pay 'N Pak Stores*, 875 F.2d 1369, 1378 (9th Cir. 1989). The court below simply did not discuss *Thurman* in applying *Lessig* to the Spectrum petitioners.

We also believe that the practical importance of *Lessig* has been diminished by the ruling in *Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988). That case holds that potentially anticompetitive conduct will not necessarily lead to antitrust liability under Section 2 if there are legitimate business justifications for the conduct. Under *Oahu Gas*, the *Lessig* rule should not be used to

justify Section 2 liability for unilateral conduct that may be procompetitive.

There is another fact-specific consideration weighing in the *Lessig* balance. Although the *Lessig* issue is properly presented by each petition, it is not clear that rejection of the *Lessig* doctrine would alter the outcome of this case. The *Lessig* issue alone could make no difference to the outcome of the Sorbothane petitioners' case (No. 91-32) because they were found liable on two Section 1 counts. Either of those claims is sufficient to support the jury's entire damages award. The Spectrum petitioners (No. 91-10) were found liable for antitrust treble damages solely on the basis of Section 2. The jury, however, was properly instructed on the elements of monopolization and conspiracy to monopolize, and it appears that the evidence on those theories may be sufficient to support a Section 2 verdict.

c. In this error-ridden decision, the court of appeals—in deciding the issue of antitrust injury—failed even to acknowledge this Court's controlling decision in *Atlantic Richfield*. That case (which reversed another Ninth Circuit antitrust decision) was decided after briefing on the merits and oral argument, but before the court of appeals issued its decision in this case. Then, to compound its error, the court of appeals failed to modify its analysis even though *Atlantic Richfield* was specifically brought to the court's attention in the petition for rehearing, and even though the court modified another portion of its opinion.

We do not assume that the Ninth Circuit will continue to ignore *Atlantic Richfield*. Indeed, the Ninth Circuit has followed *Atlantic Richfield* in a recent published opinion. See *Datagate, Inc.* v. *Hewlett-Packard Co.*, 941 F.2d 864, 868 (1991). In addition, although the court of appeals in this case appears to have presumed antitrust injury from the combination of a per se violation of the antitrust laws and proof that respondents were injured

by petitioners' conduct, the key language of the court of appeals' opinion states only that "[*i*]*njury to competition* is presumed to follow from" per se antitrust violations. Pet. App. A22 (emphasis added). Standing alone, that statement is correct and does not conflict with *Atlantic Richfield*. See 495 U.S. at 342 ("*per se* rule is a presumption of unreasonableness"; a restraint is unreasonable if "its anticompetitive effects outweigh its procompetitive effects"). Moreover, respondents may well be correct in arguing (91-32 Br. in Opp. 17) that the evidence in this case justifies a finding of antitrust injury under the analysis of *Atlantic Richfield*. Despite these considerations, the court of appeals' failure even to acknowledge this Court's decision in *Atlantic Richfield* is striking. Accordingly, we believe it would be appropriate to vacate the court of appeals' decision and remand the case for further consideration in light of *Atlantic Richfield*.

CONCLUSION

For the reasons we have stated, plenary review is not warranted in this case. The Court may, however, wish summarily to reverse the decision of the court of appeals to the extent that it rests on a holding that wholly owned subsidiaries of a common parent may conspire for purposes of Section 1 of the Sherman Act and to remand for reconsideration of the antitrust injury issue in light of *Atlantic Richfield.*

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. JAMES
Deputy Assistant Attorney General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
JAMES W. LOWE
Attorneys

FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45341

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

(5) (5)

Nos. 91-10 and 91-32

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN dba SORBOTURF ENTERPRISES,

Respondents.

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

* JEFFREY M. SHOHET
MARCELLE E. MIHAILA
GRAY, CARY, AMES & FRYE
401 B Street, Suite 1700
San Diego, CA 92101
(619) 699-2743
Counsel for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THIS COURT SHOULD NOT REVERSE OR REMAND TO CORRECT TECHNICAL ERRORS IN THE UNPUBLISHED NINTH CIRCUIT OPINION 2

III. A PARTIAL SUMMARY REVERSAL BASED ON *COPPERWELD* WOULD HAVE NO EFFECT ON THE DISPOSITION OF THIS CASE 3

IV. NO PURPOSE WOULD BE SERVED BY A REMAND OF THIS CASE TO THE NINTH CIRCUIT FOR ANOTHER RECONSIDERATION OF *ATLANTIC RICHFIELD* 7

V. THE BRIEF OF THE UNITED STATES CORRECTLY CONCLUDES THAT THE ALLEGED *LESSIG* ERROR JUSTIFIES NEITHER REMAND FOR REVERSAL 10

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 1, 2, 7, 8, 9, 10

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 1, 2, 3, 4, 5, 10

Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864 (9th Cir. 1991) 9

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.) cert. denied, 377 U.S. 993 (1964) 2, 10

Oahu Gas Service, Inc. v. Pacific Resources, Inc. 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988) 10

Respondents Larry and Shirley McQuillan file this brief in response to the brief of the United States as Amicus Curiae.

I

INTRODUCTION

Respondents agree with the conclusion of Amicus Curiae that this Court should not grant certiorari of the unpublished decision of the Ninth Circuit. However, in addition to recommending against a grant of certiorari, Amicus Curiae invites this Court to consider granting either a partial reversal on the *Copperweld* issue or remand for the Ninth Circuit Court of Appeals to again reconsider its decision in light of *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The United States' suggestions, particularly when considered in light of its discussion at pages 12 through 17 of its brief, seem lukewarm and provide no explanation of how further review by the Ninth Circuit will serve any purpose. Respondents suggest that the United States' brief itself establishes why this Court should simply deny certiorari and allow this litigation to finally conclude nearly eight years after the complaint was filed. Respondents also believe that certain critical points are either unclear from the brief of the United States or are omitted entirely. Therefore, Respondents file this brief to make or clarify these critical points.

The United States also criticizes the Ninth Circuit's *Lessig* instruction but seems to acknowledge that no purpose would be served by a remand to the Ninth Circuit for further review on this issue. The *Lessig* rule has been

part of Ninth Circuit antitrust jurisprudence since 1964. This Court has declined several recent opportunities to review this doctrine in published cases. In any event, as the United States correctly points out, reversal on this issue would not affect the outcome since the Sorbothane petitioners were also found liable on two Section 1 counts and as to both petitions, there was evidence to support alternate Section 2 counts not based on the *Lessig* presumption. (Amicus Curiae brief at p. 16.) The treble damage award is supportable on any of these alternate Sherman Act claims as well as the multiple RICO counts that are not the subject of either petition.

II

THIS COURT SHOULD NOT REVERSE OR REMAND TO CORRECT TECHNICAL ERRORS IN THE UNPUBLISHED NINTH CIRCUIT OPINION

The Ninth Circuit issued a Memorandum Decision which has no impact on anyone other than the parties. It bears emphasis that Respondents prevailed on each and every antitrust claim as well as all RICO and state law claims. As discussed below, neither the correction of alleged *Copperweld* error nor the failure of the Ninth Circuit to specifically mention *Atlantic Richfield* will change the outcome of this case. No purpose is served by further delaying this case so the Ninth Circuit can, once again, consider the arguments raised by petitioners and possibly "clean up" its opinion.

III

A PARTIAL SUMMARY REVERSAL BASED ON *COPPERWELD* WOULD HAVE NO EFFECT ON THE DISPOSITION OF THIS CASE

The United States concludes the District Court erred, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), by instructing the jury that subsidiaries of a common parent are capable of conspiring. However, the United States also recognizes that Petitioners presented *no evidence* on the relationship between the purported affiliated entities that engaged in the horizontal market allocation, including whether they were owned by a common parent. (Amicus Curiae brief at p. 13-14.) This Court should not vacate the decision and reverse based on an erroneous *Copperweld* instruction where the evidence would not have supported petitioners request for any instruction on the *Copperweld* defense.

More importantly, a remand to correct this error would not change the outcome. There were two separate Section 1 verdicts, for horizontal market allocation and resale price maintenance. While the United States suggests "it is difficult to determine whether the *Copperweld* error infected the Jury's verdict on the resale price fixing claim," (Amicus Curiae brief at p. 14, n. 11) in fact, the record is clear that the resale price fixing verdict was based on a finding of agreements that necessarily included non-affiliated corporations. For two independent and sufficient reasons, any error in the *Copperweld* instruction could not have affected, whatsoever, the jury's consideration of the resale price fixing claim.

First, the *Copperweld* instruction itself prevented the jury from finding an agreement exclusively between members of the BTR, Inc. family of corporations as the requisite Section 1 contract, combination or conspiracy. The corporate defendants found liable on the resale price maintenance claim were Hamilton Kent (the original Sorbothane manufacturing subsidiary of BTR, Inc.) and Sorbothane, Inc. (the subsidiary later created by BTR, Inc. to take over the manufacture of Sorbothane from Hamilton Kent.)[1] Both were entirely owned ultimately by BTR, Inc., which was found liable for resale price maintenance as the alter ego of Hamilton Kent and Sorbothane, Inc. BTR, Inc. was never a manufacturer of Sorbothane and neither Sorbothane, Inc. nor Hamilton Kent was ever a distributor to BTR, Inc.

The *Copperweld* conspiracy instruction provided:

> "A conspiracy cannot be found to exist between a corporation and its own agents and/or employees, nor can a conspiracy exist between a corporation and its unincorporated divisions or *its wholly-owned subsidiaries*. Conspiracy may be found to exist, however, between a corporation and other persons or independent corporations." (Emphasis added).

The instruction then explains the circumstances under which a conspiracy may exist in other affiliated corporation situations and it is the balance of the instruction with

---

[1] Hamilton Kent, Inc. a multi-product rubber extruding manufacturer, was the original manufacturer of Sorbothane in the United States. Because of the success of the product, BTR formed a stand-alone subsidiary to take over that line of business from Hamilton Kent.

which petitioners and the United States take issue. Yet in this case, the portion of the instruction set forth above negates any finding of a conspiracy exclusively between the affiliated defendants found liable for resale price maintenance. The jury was properly instructed that a parent may not conspire with its wholly owned subsidiaries. Thus, the verdict could not have been based on an agreement between BTR, Inc. and either Sorbothane, Inc. or Hamilton Kent, Inc. The verdict also could not have been based on an agreement between these two subsidiaries. They were *successor manufacturers* of Sorbothane. At no time could they have conspired with one another to maintain resale prices and there was no suggestion or evidence that they did so. In short, the jury would have to have ignored this *Copperweld* instruction to have found resale price maintenance based on a conspiracy between these BTR related defendants.

Second, the resale price maintenance instruction provided, in pertinent part:

> "Plaintiff has charged the defendants with what is called resale price fixing Resale price fixing is illegal under Section 1 of the Sherman Act and Cartwright Acts. *It is an Agreement between firms at different levels of a chain of distribution* to set the resale prices or price ranges for production.
>
> . . .
>
> In order to win on this claim, plaintiffs must prove each of the following by a preponderance of the evidence: first, *that the defendant entered into the agreement with another distributor of the defendants' or with the plaintiff, to fix resale prices. . . .* " (Emphasis added.)

R.T. at p. 4238-4239.

Since this instruction required the jury to find an agreement between two firms at different levels in the chain of distribution, *and* between a defendant and another distributor, it is impossible for the jury to have found resale price maintenance based solely on agreement between the affiliated BTR defendants *all of which were defendants at the same level of the distribution chain.*[2] Sorbothane and Hamilton Kent were manufacturers, and BTR Inc. simply was not in the chain of distribution. It was found liable as the alter ego *of these manufacturers.* The jury therefore necessarily premised its resale price fixing verdict on an agreement between a defendant and one or more unrelated third parties.

Thus, it was impossible for the jury to have properly followed the instructions, concluded that BTR, Inc. was the alter ego of Hamilton Kent and Sorbothane, Inc. and yet come to an incorrect conclusion on resale price maintenance as a result of any error in the *Copperweld* instruction. To have done so, the jury would have had to

---

[2] Note that this instruction unnecessarily precluded the jury from finding an agreement *between defendants* as the resale price fixing agreement. This perhaps explains why Spectrum was exonerated despite overwhelming evidence that it participated in the resale price maintenance plan and was of course, a distributor at a different level in the distribution chain from the other defendants. It establishes, however, that the jury could not have possibly found the requisite agreement to have been between the BTR affiliated defendants alone. The jury must have concluded, as suggested by the United States in n. 11 of its brief, that the agreement was made between the defendants and one of the other distributors not named as a defendant in the complaint.

completely ignore both the *Copperweld* and the resale price maintenance instructions.

IV

NO PURPOSE WOULD BE SERVED BY A REMAND OF THIS CASE TO THE NINTH CIRCUIT FOR ANOTHER RECONSIDERATION OF *ATLANTIC RICHFIELD*

The United States invites this Court to consider a remand to the Ninth Circuit for further review in light of the discussion of antitrust injury in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). Yet, the United States completely fails to comment on the fact that the only assignment of error on this issue is a *procedural* one – the failure to submit this issue of law to a jury. Petitioners never properly challenged whether respondents suffered antitrust injury, and the United States acknowledges that "respondents may well be correct in arguing that the evidence in this case justifies a finding of antitrust injury under the analysis of *Atlantic Richfield*" (Amicus Curiae brief at p. 17.)

Whatever academic discussion of antitrust injury could be undertaken in some other context, the antitrust issue in this case is the erroneous claim that antitrust injury is appropriate for a jury instruction. Antitrust injury is plainly a legal issue for the court, not a fact question for the jury. Although the brief of the United States does not address this point, it is fatal to Petitioners' argument before this Court. If, as the United States appears to concede, the evidence justifies a finding of

antitrust injury in this case, no purpose is served by further review of this issue.

The Petitions for Rehearing to the Ninth Circuit were apparently given careful consideration (as suggested by the modification of the original decision on a fairly technical point.) The first and most prominent argument in support of the Petitions for Rehearing was whether the original decision should be modified in light of *Atlantic Richfield*. After nine months under submission, the Ninth Circuit apparently concluded that this Court's discussion of antitrust injury in *Atlantic Richfield* did not require a modification of the opinion or change the result in the case. While the United States believes it would have been preferable for the Ninth Circuit to explain why it rejected the fallacious argument that *Atlantic Richfield* somehow required reversal, it is clear the Ninth Circuit did that analysis and reached the correct conclusion. Absolutely no purpose would be served by having the Ninth Circuit once again reconsider its opinion in light of *Atlantic Richfield*.

As the United States points out, there is nothing incorrect about the Ninth Circuit opinion as it relates to antitrust injury. The Ninth Circuit merely states the unassailable rule of law that *harm to competition* is presumed to flow from a per se violation. *It does not state that antitrust injury is presumed to flow from per se violations of the antitrust laws.*[3] Since there is nothing incorrect about

---

[3] It is noteworthy that there is no suggestion in the Ninth Circuit decision that it relied on its overrruled decision in

(Continued on following page)

the Ninth Circuit opinion, and since the Ninth Circuit already reconsidered this issue for nine months, there is no justification for remanding this case for yet another reconsideration in light of *Atlantic Richfield*. This is particularly true since, as the United States points out, the Ninth Circuit has recently followed *Atlantic Richfield* in *Datagate, Inc. v. Hewett-Packard Co.*, 941 F.2d 864, 868 (9th Cir.1991).

All of these considerations dictate against remanding this case to the Ninth Circuit for any further proceedings in light of *Atlantic Richfield*. The United States' suggestion to the contrary apparently arises not out of any conviction that the District Court or Ninth Circuit erred in the

---

(Continued from previous page)

Atlantic Richfield (which incorrectly concluded that a presumption of antitrust injury follows from per se unlawful conduct). The opinion is not cited anywhere in the Ninth Circuit decision. Any confusion in the Ninth Circuit discussion of antitrust injury results from the confusion in the way in which the issue was framed by petitioners in their briefs. Petitioners never properly raised any substantive challenge to the existence of antitrust injury. Sorbothane, Inc., in its answering and opening brief to the Ninth Circuit at p. 44 (lines 4-8) raised only the failure to give its requested instruction on antitrust injury. Spectrum's answering and opening brief, at pages 30-31, argues the absence of antitrust injury is demonstrated by a showing that the challenged conduct "cannot be determined to have had any effect on competition." The Ninth Circuit properly answered the contention by pointing out that *harm to competition* is presumed to follow from per se unlawful conduct. It never stated that *antitrust injury* is presumed to follow from per se unlawful conduct and did not, therefor, need to modify its decision.

antitrust injury analysis or that the result would be different; rather, the United States is bothered by the Ninth Circuit's failure to mention *Atlantic Richfield*. Remanding this case so the Ninth Circuit can add a citation to an unpublished decision would cause unnecessary delay and a waste of limited judicial resources.

V

THE BRIEF OF THE UNITED STATES CORRECTLY CONCLUDES THAT THE ALLEGED *LESSIG* ERROR JUSTIFIES NEITHER REMAND NOR REVERSAL

The United States concludes the *Lessig* doctrine of the Ninth Circuit is incorrect. The merits of that issue have already been fully briefed. More important to these Petitions for certiorari, however, is the United States' conclusion that a *Lessig* error does not justify any action by this Court. The United States points out that *Lessig* is not dispositive, that the importance of *Lessig* is diminished by the *Oahu Gas* case, and that this unpublished decision does not change the state of the law in the Ninth Circuit. It is clear that any alleged *Lessig* error does not justify any action by this Court.

VI

CONCLUSION

The Petitions for certiorari should be denied since no legitimate issue is raised by Petitioners. The assignment of error on the *Copperweld* instruction would not be dispositive of all the antitrust claims and the request for a jury instruction on the antitrust issue is simply specious.

It would be a futile and time consuming exercise to either partially reverse or to remand this case to the Ninth Circuit. No issue merits a grant of certiorari, no issue merits a reversal of any kind, and no issue merits a remand. This case has been pending for almost eight years with over two of those years spent in the Ninth Circuit. Respondents respectfully request that consideration be given to whether the interests of justice will be served by further proceedings below.

Respectfully submitted,

* JEFFREY M. SHOHET
MARCELLE E. MIHAILA
GRAY, CARY, AMES & FRYE
401 B Street, Suite 1700
San Diego, CA 92101
(619) 699-2743
Counsel for Respondents

* Counsel of Record

March 3, 1992

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY MCQUILLAN, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN F. BOMSTER*
JOHN A. TARANTINO
W. JAMES MCKAY
ADLER POLLOCK & SHEEHAN INCORPORATED
2300 Hospital Trust Tower
Providence, RI 02903
(401) 274-7200

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THE POINTS RAISED BY RESPONDENTS ARE IRRELEVANT OR INCORRECT ATTACKS ON THE AMICUS CURIAE ANALYSIS 1

III. CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 2, 3

Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987) 2

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 1

Int'l Travel Arrangers v. NWA, Inc., 723 F. Supp. 141 (D. Minn. 1989) 2

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 3

Key Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990) 2

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 5, 6

Oahu Gas Serv., Inc. v. Pac. Resources, Inc., 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988) 5

R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989) 2

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 133 F.R.D. 41 (D. Nev. 1990) 2

OTHER AUTHORITIES

Antitrust Civil Jury Instructions (1980) 2

Supreme Court Rule 15.7 1

I.

INTRODUCTION

This memorandum is filed pursuant to Supreme Court Rule 15.7 to address Respondents' Reply Brief in Response to Brief for the United States as Amicus Curiae (hereinafter "Respondents' Reply"). For the reasons set forth below it is requested that this Court grant certiorari and summarily reverse to correct the three manifest errors in legal analysis identified by the United States in the Brief for the United States as Amicus Curiae (hereinafter "Amicus Curiae Brief"). Further, the verdict in this case cannot survive a remand to correct the errors identified by the United States.

II.

THE POINTS RAISED BY RESPONDENTS ARE IRRELEVANT OR INCORRECT ATTACKS ON THE AMICUS CURIAE ANALYSIS

1. Contrary to the statement in Respondents' Reply, p. 2, the presence of RICO and state law claims at the trial level is irrelevant to a determination by this Court whether summary reversal or plenary review is appropriate. The Ninth Circuit declined to address any issues in its opinion other than the antitrust issues which are the subject matter of this Petition.[1]

---

[1] Respondents' attempt to advance an issue, *i.e.*, the resale price maintenance claim, that was not decided by the Ninth Circuit, is improper and also ignores the Petitioners' challenge below based on, *inter alia*, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). The District Court

(Continued on following page)

2. The issue of antitrust injury goes to all grounds of antitrust liability considered below, and therefore a remand for reconsideration in the light of *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), will necessitate a new trial.

Contrary to Respondents' arguments, antitrust injury is a proper subject of a jury instruction on issues of fact.[2]

(Continued from previous page)

refused to instruct the jury under *Sharp* that to find vertical price fixing, Respondents must show an agreement as to price levels between the manufacturer and the surviving distributors. This was impossible because the sole surviving athletic distributor, Spectrum Sports, was exonerated by the jury on the price fixing claim.

[2] *See Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1560 (11th Cir. 1990) (endorsing jury conclusion that plaintiff suffered a injury of the type the antitrust laws were intended to prevent); *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989) (court examines whether genuine issue of material fact present on antitrust injury element for purposes of summary judgment); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 n.2 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987) (district court properly instructed the jury on its obligation to find an antitrust injury in order to return a verdict of liability); *Int'l Travel Arrangers v. NWA, Inc.*, 723 F. Supp. 141, 150 (D. Minn. 1989) (court determines that plaintiff "sufficiently alleged antitrust injury and has supported its claims with enough competent evidence to create issues of fact for a jury to decide"). Additionally, the model *Antitrust Civil Jury Instructions* propounded by the Antitrust Law Section of the American Bar Association similarly reflect that the issue is one for the jury's consideration. *See Antitrust Civil Jury Instructions* (1980), pp. S-49 through S-51 (1985 Supp.) (sample instructions). *Cf. Rebel Oil Co., Inc. v.*

(Continued on following page)

The United States observes that the trial evidence might justify a finding of antitrust injury under the *Atlantic Richfield* analysis. While that possibility exists, the refusal of the District Court to instruct on antitrust injury precluded any such finding and mandates reversal and retrial.

No decision was made by either the jury (as a factual matter) or the District Court (as a matter of law) as to the existence of antitrust injury so as to create a record that would have been subject to appellate review. The Ninth Circuit opinion does not fill this void and, as frequently stated by this Court, this Court will "not ordinarily address" an unresolved issue from the record below. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

3(a). Reversal and remand on *Copperweld* is appropriate. Contrary to the statement in Respondents' Reply Brief, p. 3, the evidence supported Petitioners' request for an instruction on a *Copperweld* defense and the instruction was not given.[3] *See* Amicus Curiae Brief, p. 8 n.7 and Ninth Circuit decision, Appendix A to Petition, p. 13 (Ninth Circuit found as a predicate for its decision that relevant entities were within same family). Additionally,

---

(Continued from previous page)

Atlantic Richfield Co., 133 F.R.D. 41, 44-45 (D. Nev. 1990) (*Atlantic Richfield* leaves open the question whether antitrust injury is for jury or trial court).

[3] Respondents' observation that Petitioners presented no evidence on the relationship of the *Copperweld* affiliated entities is both irrelevant and inaccurate. Respondents themselves presented that evidence. *See* Amicus Curiae Brief, pp. 13-14.

the *Copperweld* instruction referenced in Respondents' Reply, p. 4, is incomplete. The complete *Copperweld* instruction below[4] confirms the error by the District Court in giving the instruction, and by the Ninth Circuit in affirming.

(b) Upon reversal and remand based on *Copperweld*, no Section 1 claim will survive. Contrary to the statement in Respondents' Reply, p. 6 n.2, the United States does not suggest that an illicit agreement existed between Petitioners and an unaffiliated distributor so as to support a Section 1 violation. In fact, the United States points out that the jury verdict suggests that "the jury thought the Sorbothane Petitioners had conspired with themselves." Amicus Curiae Brief, p. 14 n.11.[5] Furthermore, while the

---

[4] A conspiracy between affiliated corporations may be found to exist unless the affiliated corporations are functioning as a single economic enterprise. The defendants have the burden of establishing that all members of the alleged conspiracy function as a single economic enterprise. To determine whether affiliated corporations function as a single economic enterprise, the jury must examine the particular facts of the case before it in accordance with various criteria. Among the criteria which may be examined when determining whether affiliated corporations function as a single economic enterprise are: (1) whether they have separate control of their day-to-day operations; (2) whether they hold themselves out as competitors; (3) whether they have separate officers; (4) whether they have separate corporate headquarters; and (5) whether they have common investors or owners. To find affiliated corporations to be a single economic enterprise, the jury must find a complete unity of interest between them.

[5] Respondents state that this is impossible because the *Copperweld* charge as given prohibited a finding of conspiracy

(Continued on following page)

United States notes that it was "possible" that an unaffiliated and unnamed potential conspirator could have been found by the jury to be a party to such an agreement, the United States also recognizes that the hypothetical conspirator, in fact, could not have been a Section 1 co-conspirator because it distributed medical products – products which were not functional substitutes for, and so were not competitive with, the athletic products sold by Respondents in the submarket as defined by Respondents and the District Court. Amicus Curiae Brief, p. 14 n.11.

4. Respondents apparently agree that *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), is not the law, but nevertheless argue that because of the diminished importance of the *Lessig* decision, in light of *Oahu Gas Serv., Inc. v. Pac. Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988), this Court should simply ignore the error in this case. Over Petitioners' objection, the District Court gave the erroneous *Lessig* charge and denied an *Oahu Gas* charge that pro-competitive intent, even when coupled with other motives, cannot result in liability. Record Transcript, p. 3915. The combined errors of *Lessig* and *Oahu Gas* were argued by Petitioners to the Ninth Circuit which, without discussion or analysis, applied *Lessig* in

---

(Continued from previous page)

between a parent and its wholly-owned subsidiary, and then suggest that BTR was the direct parent of Sorbothane, Inc. and Hamilton-Kent. Respondents' Reply, p. 4. This suggestion is incorrect, as BTR was an indirect parent with an intermediate wholly-owned subsidiary, a fact stipulated to by Respondents in the District Court. Record Transcript, p. 4281.

an expansive way. *Lessig* was the law in this case, an error that can be cured only by reversal and remand to the District Court.

III.

CONCLUSION

The Petition for Certiorari should be granted or, for the reasons stated in the Brief of the United States, the decision of the Ninth Circuit should be summarily reversed.

Dated March 11, 1992.

Respectfully submitted,

JOHN F. BOMSTER*
JOHN A. TARANTINO
W. JAMES MCKAY
ADLER POLLOCK & SHEEHAN
INCORPORATED
2300 Hospital Trust Tower
Providence, RI 02903
(401) 274-7200

*Counsel of Record

Nos. 91-10 and 91-32

Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN dba SORBOTURF ENTERPRISES,

Respondents.

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONERS

* Jeffrey M. Shohet
Marcelle E. Mihaila
Gray, Cary, Ames & Frye
401 B Street, Suite 1700
San Diego, CA 92101
(619) 699-2743
Counsel for Respondents

* Counsel of Record

TABLE OF CONTENTS

Page

I THE DISTRICT COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY ON ANTITRUST INJURY, WHICH IS A QUESTION OF LAW 1

II THE NINTH CIRCUIT DID NOT ERR IN UPHOLDING THE JURY'S SECTION 1 VERDICT FOR RESALE PRICE MAINTENANCE ... 3

III REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *COPPERWELD* ISSUES 7

IV REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *LESSIG* PRESUMPTION 8

V CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276 (4th Cir.) *cert. denied*, 484 U.S. 823 (1987) 1

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 2

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 3, 6

Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984) 7

Int'l Travel Arrangers v. NWA, Inc., 723 F.Supp. 141 (D.Minn. 1989) 1

Key Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990) 1

R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2nd Cir.) *cert. denied*, 493 U.S. 823 (1987) 1

RULES:

Supreme Court Rule 15.7 1

This brief is filed pursuant to Supreme Court Rule 15.7 to address issues raised in the Supplemental Brief of Petitioners in Support of Petition for Writ of Certiorari.

I

THE DISTRICT COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY ON ANTITRUST INJURY, WHICH IS A QUESTION OF LAW.

The Sorbothane petitioners persist in arguing that the jury should have been instructed on antitrust injury, and for the first time purport to cite to authority for this proposition. None of the cited cases held that the trial court must, or even should instruct the jury as to the antitrust injury. In *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1560 (11th Cir. 1990) and *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 n.2 (4th Cir.) *cert. denied*, 484 U.S. 823 (1987) the courts merely affirmed, based on consideration of the evidence, that the plaintiffs suffered antitrust injury. In *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107 (2nd Cir.) *cert. denied*, 493 U.S. 823 (1987), the court affirmed that plaintiff met its burden in opposition to summary judgment to show a disputed issue of material fact as to antitrust injury. Similarly, in *Int'l Travel Arrangers v. NWA, Inc.*, 723 F.Supp. 141, 150 (D.Minn. 1989) the court held that plaintiffs had sufficiently alleged antitrust injury to avoid dismissal. Neither case discusses whether antitrust injury is a question of law, let alone whether the jury must be instructed as to antitrust injury.

Petitioners also cite to the 1985 Supplement to the 1980 edition of *Antitrust Civil Jury Instructions*, published

by the ABA Section of Antitrust Law. Respondents do not have these (superseded) instructions, but judging from petitioners' other citations, respondents have no confidence these are antitrust injury instructions. At trial, Petitioners agreed that standing and antitrust injury are questions of law (Pretrial Order, Defendants/Appellants E.R., p. 184) and then submitted a pattern instruction on proximate cause with a definition of antitrust injury added on.

Furthermore, the 1987 and 1990 editions of *Sample Jury Instructions in Civil Antitrust Cases* published by the ABA Section of Antitrust Law do not include antitrust injury instructions, and in the introduction state

> Certain areas of antitrust law are omitted because they involve only questions of law, or because the likelihood or frequency of jury issues is minimal. *For example, there are no instructions relating to standing to sue. . . .*

Id. at p. xix (1987 edition) and p. xx (1990 edition) (emphasis added). Antitrust injury is a legal issue subsumed within antitrust standing. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (competitor that has not suffered antitrust injury does not have standing under the antitrust laws). Therefore, the ABA Section on Antitrust has recognized, at least for the last five years, that the jury should not be instructed on antitrust injury.

II

THE NINTH CIRCUIT DID NOT ERR IN UPHOLDING THE JURY'S SECTION 1 VERDICT FOR RESALE PRICE MAINTENANCE.

Petitioners attack the resale price fixing verdict on the ground that under *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), respondents must show an agreement as to price levels between the manufacturer and the surviving distributors. While Petitioners did not raise this point in their Petition for Writ of Certiorari,[1] the agreement to fix prices and terminate price cutting distributors in this case fits squarely within the definition of per se unlawful vertical price fixing in *Sharp*.

There was substantial evidence that respondent Sorboturf was terminated pursuant to a specific agreement to maintain resale prices. The agreement between Sorbothane (the manufacturer) and the two surviving distributors was that each distributor would maintain resale prices, and in return Sorbothane, Inc. would terminate regional distributors. The two distributors who entered into this agreement with Sorbothane were petitioner Kenneth Leighton Jr., whose company Spectrum Sports became the exclusive national distributor to athletic retailers, and John Burne, whose company IEM became the exclusive distributor to medical retailers.[2] The

---

[1] The petition discusses *Sharp* only in the context of whether respondents suffered antitrust injury. Petition for Writ of Certiorari, p. 19.

[2] While the regional distributors expressly agreed to fix prices, (R.T. p. 828, lines 1-13) Sorbothane was not satisfied

(Continued on following page)

so-called medical market was simply retailers who sold medical supplies. The same Sorbothane insole was repackaged for these retailers, and sold at twice the price of the athletic insole. (R.T., Vol. V, pp. 834, line 20 – 835 line 10.)

Petitioners do not challenge the sufficiency of the evidence of the agreement. Petitioners instead attempt to show that the verdict was inconsistent with a finding of conspiracy between Sorbothane and its new exclusive distributors. As to Spectrum Sports, petitioners again urge that since Spectrum Sports was not found liable on the vertical price fixing claim, the jury must have concluded that it did not agree to maintain resale prices. Respondents address this contention in their Response to the Brief For the United States as Amicus Curiae, at p. 6, n.2.

Petitioners claim that IEM "could not have been a Section 1 conspirator because it distributed medical products – products which were not functional substitutes for, and so were not competitive with, the athletic products sold by Respondents in the submarket as defined by Respondents and the District Court." That is nonsense.[3]

(Continued from previous page)

with their performance in maintaining retail prices. For example, respondent Sorboturf failed to police all of its retailers. R.T. Vol II, p. 300, lines 2-6.) Spectrum Sports, on the other hand, was an enthusiastic price fixer. Leighton Jr. boasted to Sorbothane, Inc. of his techniques in enforcing retail list price. R.T. Vol. V., p. 830, lines 13-25.)

[3] It is also untrue. The relevant market proposed by Respondents included all Sorbothane shoe inserts. (Pretrial Order ¶ 141, Spectrum. E. R. p. 111.)

First, the relevant product market has nothing to do with the analysis of per se vertical price fixing. Respondents need only show they were terminated as part of an agreement to fix prices on a product or products.

Second, the purpose of the price fixing and dealer termination agreement in this case was to maintain resale prices in both the so-called "medical" and "athletic" markets. Before the agreement to terminate the regional distributors, respondents and the other regional distributors sold sorbothane insoles to athletic and medical retailers. (R.T. Vol. V, pp. 833 line 18 - 834 line B.)[4] IEM objected to this, since it interfered with John Burne's plan to charge double the athletic insert price to the medical market. (*Id.*) Therefore, under the agreement between Sorbothane, Inc., Spectrum Sports and IEM, the regional distributors were to be terminated, the surviving exclusive distributors would sell at different prices to these different retailers. Spectrum Sports agreed to maintain the price (in the newly separated athletic market) which the regional distributors had failed to maintain. IEM would maintain an even higher price to medical retailers.

John Burne endorsed the plan to have Spectrum Sports as the sole national distributor to athletic retailers because he knew that Leighton Jr. would enforce price agreements for the sale of the athletic insoles, and thus

---

[4] The only difference between the two insoles was the color. (R.T. Vol. X, p. 1753, lines 17-21; pp. 1754, line 22 – 1755 line 9.)

minimize the price competition with the medical insoles. (*Id.* pp. 835 line 8 – 836 line 18.)[5]

Therefore, it is absurd for petitioners to now argue that IEM could not have been a Section 1 conspirator with Sorbothane, Inc. It was IEM's idea to call the meeting at which the agreement to terminate respondents and reinvigorate the price fixing plan was reached. (*Id.* p. 833 lines 16-25.) Respondents were terminated to enable IEM to charge higher fixed prices in the newly designated medical market. (*Id.* p. 834 lines 1-24.) In short, the agreement between petitioner (Sorbothane, Inc.), Spectrum Sports and IEM to terminate regional distributors and then maintain fixed prices was sufficient to support the vertical price fixing claim. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) ("a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels").[6]

---

[5] As Ms. Heinsohn testified at trial, "A doctor could go down to a sporting goods store and buy a pair of insoles cheaper than getting it from John Burne." (R.T. Vol. V, p. 835 lines 8-10.) This was the problem the termination of regional distributors was intended to solve.

[6] If the Court has any concern whether respondents have satisfied the elements of *Sharp*, respondents urge the Court to review pages 823-843 of the Trial Transcript, wherein Ms. Heinsohn, the marketing manager for Sorbothane, Inc., describes the meeting she attended with John Burne and Leighton Jr. The Trial Transcript of this testimony is appended to this brief.

III

REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *COPPERWELD* ISSUES

Respondents do not concede there was any error in the jury instructions under *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984). Respondents' discussion of the *Copperweld* issue in their response to the brief by the United States merely shows that even if there were error, remand on this issue would serve no purpose, since (1) there was no evidence entitling petitioners to a *Copperweld* defense, (2) the vertical price fixing verdict could not have been based on a conspiracy between the affiliated companies, and (3) there were multiple verdicts on section 2 and RICO claims, each of which would support the entire damage award.

Petitioners discussion of the *Copperweld* issues is limited to conclusions and curious citations. On the issue of whether there was evidence to support a *Copperweld* defense, petitioners refer to the Amicus Curiae brief at p. 13-14. Yet the United States concludes that "the jury may have found a conspiracy because it did not believe that petitioners presented sufficient evidence of their affiliation." Moreover, apart from what the jury may have done, the record would not support a defense to either section 1 claim based on *Copperweld*.

Petitioners refer to Amicus Curiae brief, p. 14 n.11 on whether the vertical price fixing verdict was based on a conspiracy between affiliated companies. There, the United States acknowledges that the jury was instructed that it must find an agreement between firms at different levels of a chain of distribution, and thus the verdict

could be based (as it was) on an agreement between the Sorbothane petitioners and independent distributors. While the United States goes on to note (without explanation) that "the issue is further complicated" because IEM was a medical insole distributor, as is discussed above, the agreement to fix prices and terminate respondents was directly tied to price fixing agreements on sorbothane insoles sold to both medical and athletic retailers.

IV

REVERSAL AND REMAND IS NOT APPROPRIATE ON THE *LESSIG* PRESUMPTION.

On *Lessig*, petitioners reach the odd conclusion that "Respondents apparently agree that *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.) *cert. denied*, 377 U.S. 993 (1964) is not the law." *Lessig* is well-settled law in the Ninth Circuit. Respondents' point is that *if* this Court wishes to review the *Lessig* presumption, this is not the case to do it. If the Court agrees, further review by the Ninth Circuit will serve no purpose.

V

CONCLUSION

Respondents urge the Court to look beyond the conclusion of the United States that the Ninth Circuit's opinion is unclear or contains error in considering whether to summarily reverse and remand for another one to three years of review. The record before this Court amply demonstrates that further review would lead to the same

outcome between the parties and therefore serve no purpose. Respondents respectfully request that the Court consider the record, which demonstrates the jury was properly instructed, and the antitrust verdicts are supported by substantial evidence.

Respectfully submitted,

* JEFFREY M. SHOHET
MARCELLE E. MIHAILA
GRAY, CARY, AMES & FRYE
401 B Street, Suite 1700
San Diego, CA 92101
(619) 699-2743
Counsel for Respondents

*Counsel of Record

APPENDIX

Portions of Trial Testimony of Laurene Heinsohn

[823]

MENT THAT WAS DONE FOR THE PROMOTION OF SORBOTHANE PRODUCTS?

A. THEY PAID SOME, YES.

Q. WHAT DID THEY PAY? WHAT DID HAMILTON KENT OR SORBOTHANE PAY FOR DURING THAT ENTIRE PERIOD?

A. THEY SUPPORTED THE SPORTING GOODS TRADE SHOWS, FOR EXAMPLE, SUPPORTING THE DEVELOPMENT OF THE BOOTH USED IN THAT TRADE SHOW; AND THEY DID HAVE AN ADVERTISING ALLOTMENT FOR OUR ADVERTISING BUDGET, WHATEVER THAT TOTAL WAS. THEY DID HAVE A PERCENT SHARE OF THE CONTRIBUTION IN THAT.

Q. DESCRIBE HOW THAT RELATED TO THE CONTRIBUTION OF THE REGIONAL DISTRIBUTORS, IF YOU CAN.

WAS THE CONTRIBUTION OF HAMILTON KENT INSIGNIFICANT IN RELATION TO WHAT THE REGIONAL DISTRIBUTORS WERE DOING FOR DIRECT ADVERTISING?

A. I DON'T KNOW IF "INSIGNIFICANT" IS THE RIGHT WORD. IT WAS NOT THE SAME RATIO, PER SE, AS FAR AS THE BENEFIT RECEIVED.

Q. NOW, AS THE MARKETING MANAGER OF THE SORBOTHANE DIVISION OF HAMILTON KENT, AS OF YEAR END, 1981, DID YOU FEEL, AS THE MARKETING MANAGER, THAT AN ORAL AGREEMENT HAD BEEN REACHED WITH SHIRLEY MC CONE REGARDING HER SERVICES AS DISTRIBUTOR?

MR. BOMSTER: OBJECTION.

THE COURT: SUSTAINED.

BY MR. SHOHET:

Q. I WOULD LIKE TO NOW ASK YOU, MS. HEINSOHN, A LITTLE BIT CONCERNING PRICING POLICY AT HAMILTON KENT AND SORBOTHANE.

[824]

DID YOU HAVE DISCUSSIONS WITH ANY OF THE DISTRIBUTORS CONCERNING AT WHAT PRICE, IF ANY, THEY WOULD BE PERMITTED TO RESELL SORBOTHANE PRODUCTS?

A. YES.

MR. BOMSTER: IF IT PLEASE THE COURT, MAY I HAVE A TIMEFRAME ON THIS, PLEASE?

THE COURT: I ASSUME HE WILL.

BY MR. SHOHET:

Q. DID YOU HAVE DISCUSSIONS WITH THEM SHORTLY AFTER THE DISCUSSIONS THAT YOU IDENTIFIED WHERE YOU SAID, "GO AHEAD AND BEGIN MARKETING"?

A. YES.

Q. SO THAT WOULD BE IN THE FALL TO WINTER, 1981?

A. YES.

Q. WHAT DID YOU TELL THEM WITH REGARD TO THE RESALE PRICE OF SORBOTHANE BY THE DISTRIBUTORS?

A. TO MAINTAIN THE RESALE PRICE.

THE COURT: WHAT WAS THAT TO BE, 50 PERCENT MARKUP, MA'AM?

THE WITNESS: YES.

BY MR. SHOHET:

Q. AND DID YOU HAVE DISCUSSIONS WITH KENNETH M. LEIGHTON CONCERNING YOUR DIRECTION TO THE DISTRIBUTORS TO HOLD THE RESALE PRICE AT A 50 PERCENT MARKUP?

A. YES.

[825]

Q. AND DID KENNETH M. LEIGHTON GIVE YOU ANY PARTICULAR DIRECTION WITH REGARD TO THAT SUBJECT? DID HE TELL YOU TO GO AHEAD AND TELL THE DISTRIBUTORS TO DO THAT?

MR. BOMSTER: OBJECTION.

THE COURT: NO. I WILL NOTE YOUR OBJECTION AND OVERRULE IT.

YOU CAN ANSWER IT NOW.

THE WITNESS: YES. MR. LEIGHTON, SR., TOLD ME TO MANAGE THE DISTRIBUTORS TO MAINTAIN THAT WHOLESALE PRICE.

Q. DID MR. LEIGHTON, DURING THE ENTIRE COURSE OF YOUR EMPLOYMENT AT HAMILTON KENT OR SORBOTHANE, INC., EVER TELL YOU TO CONTACT A DISTRIBUTOR BECAUSE THERE WAS DISCOUNTING GOING ON IN THAT DISTRIBUTOR'S TERRITORY?

A. YES.

Q. ON HOW MANY OCCASIONS DO YOU RECALL KENNETH M. LEIGHTON TELLING YOU TO CONTACT A DISTRIBUTOR AS A RESULT OF DISCOUNTING?

A. ONE SPECIFIC TIME THAT I REMEMBER.

Q. WHAT WERE THE CIRCUMSTANCES OF THAT SPECIFIC INSTANCE? DO YOU REMEMBER THE TIME?

A. YES. IN NOVEMBER OF 1981, MARTY VOGEL WAS SELLING BELOW WHAT WE HAD – BELOW WHAT WE HAD RECOMMENDED AS THE WHOLESALE PRICE.

Q. HOW DID YOU LEARN THAT HE WAS DOING THAT?

A. KEN LEIGHTON, JR., DISCOVERED IT AND NOTIFIED MYSELF AND

[826]

KEN LEIGHTON, SR.

Q. DID YOU DISCUSS THAT WITH KEN LEIGHTON, SR.?

A. YES.

Q. WHAT DID YOU DISCUSS? WHAT DID HE SAY AND WHAT DID YOU SAY?

A. HIS REQUEST TO ME WAS TO CALL MARTY AND TO ASK MARTY TO MAINTAIN THE PRICE THAT WE HAD ASKED HIM TO MAINTAIN.

Q. DID YOU DO SO?

A. YES.

Q. DID MR. VOGEL TELL YOU – WHAT DID MR. VOGEL SAY TO YOU WITH REGARD TO YOUR REQUEST THAT HE HOLD THE PRICE?

A. MR. VOGEL RESPONDED POSITIVELY.

Q. DID YOU HAVE DISCUSSIONS WITH OTHER DISTRIBUTORS REGARDING THEIR HOLDING THE RESALE PRICE?

A. YES.

Q. DID THE OTHER DISTRIBUTORS – DID MR. VOGEL AND THE OTHER DISTRIBUTORS AGREE TO HOLD THE RESALE PRICE OF SORBOTHANE IN THEIR TERRITORY?

MR. BOMSTER: OBJECTION.

MR. MAC ADAMS: FOUNDATION, YOUR HONOR.

THE COURT: I THINK WE ARE GETTING INTO SOME OTHER AREAS. IT SMACKS OF HEARSAY, SIR. I DON'T KNOW WHAT OTHER PURPOSE IT WOULD HAVE.

MR. SHOHET: SIMPLY TO ESTABLISH AN AGREEMENT; AND IT'S REALLY VERBAL CONDUCT.

[827]

THE COURT: HOW ARE YOU GOING TO DO THAT? ARE YOU GOING TO DO EACH INDIVIDUAL DISTRIBUTOR?

MR. SHOHET: I CAN DO THAT.

BY MR. SHOHET:

Q. MS. HEINSOHN, DID ANY OF THE DISTRIBUTORS EXPRESS A WILLINGNESS OR AGREEMENT TO HOLD THE RESALE PRICE OF SORBOTHANE?

MR. BOMSTER: OBJECTION, NO FOUNDATION.

THE COURT: LAY A FURTHER FOUNDATION.

BY MR. SHOHET:

Q. FIRST, IF YOU WOULD SAY WHAT OCCURRED, AND THEN I WOULD LIKE TO KNOW WHEN AND WHAT CIRCUMSTANCES.

A. YES, IT DID OCCUR.

Q. WITH WHICH DISTRIBUTORS DID YOU REACH AN AGREEMENT ON THEIR PART TO HOLD THE RESALE PRICE?

MR. MAC ADAMS: OBJECTION.

MR. VAIL: OBJECTION.

THE COURT: I WILL NOTE YOUR OBJECTION.

WAS THERE ANY DISSENT FROM THAT, MA'AM, ON HOLDING THE PRICE BY ANY DISTRIBUTORS?

THE WITNESS: YES.

THE COURT: OKAY. YOU MAY INQUIRE.

BY MR. SHOHET:

Q. WHICH OF THE DISTRIBUTORS DISAGREED OR WERE UNWILLING? WHICH, IF ANY, WERE UNWILLING TO HOLD THE PRICE?

A. R.H.R. AND SORBOTURF.

[828]

Q. DID MARTY VOGEL EXPRESS A WILLINGNESS TO HOLD THE RESALE PRICE?

A. YES.

Q. DID KENNETH B. LEIGHTON?

A. YES.

Q. DID ARNIE LUND EXPRESS A WILLINGNESS TO DO SO?

A. YES.

Q. DID YOU EVER DISCUSS WITH ANY OF THE DISTRIBUTORS WHETHER, IF THEY FAILED TO HOLD THE RESALE PRICE OF SORBOTHANE, THEIR RIGHT TO CONTINUE TO ACT AS A DISTRIBUTOR WOULD BE AFFECTED?

A. YES.

Q. WITH WHOM DID YOU HAVE THOSE DISCUSSIONS.

A. SPECIFICALLY WITH MARTY VOGEL.

Q. WHAT DID YOU TELL MR. VOGEL WITH REGARD TO THE CONSEQUENCES TO HIS DISTRIBUTORSHIP IF HE DID NOT MAINTAIN THE RESALE PRICE?

A. THAT IT WOULD REFLECT NEGATIVELY REGARDING HIS PERFORMANCE APPROVAL OR EVALUATION.

Q. DID YOU DISCUSS WITH KENNETH M. LEIGHTON THE FACT THAT YOU EITHER HAD OR MADE SUCH A STATEMENT TO MR. VOGEL?

A. I WAS DIRECTED BY MR. LEIGHTON TO MAKE THAT STATEMENT.

Q. DID YOU UNDERSTAND THAT THE OTHER DISTRIBUTORS – STRIKE THE QUESTION.

TO YOUR KNOWLEDGE, WERE THE OTHER DISTRIBUTORS AWARE OF THE FACT THAT, IF RESALE PRICES WERE NOT MAINTAINED, THEIR DISTRIBUTORSHIP WOULD BE IN JEOPARDY?

[829]

MR. MAC ADAMS: OBJECTION.

MR. VAIL: OBJECTION.

THE COURT: I WILL OVERRULE THE OBJECTION. YOU CAN ANSWER THAT.

THE WITNESS: YES.

BY MR. SHOHET:

Q. NOW, I WOULD LIKE TO TALK TO YOU A LITTLE BIT WITH REGARD TO THE PRICING POLICIES, IF ANY, THAT RELATED TO THE RETAIL PRICE FOR SORBOTHANE.

DID YOU HAVE DISCUSSIONS WITH ANY OF THE DISTRIBUTORS CONCERNING THEIR RESPONSIBILITIES TO SEE THAT THE RETAIL PRICE OR THE PRICE SOLD BY THEIR CUSTOMERS TO THE PUBLIC WAS FIXED?

A. YES.

Q. WITH WHOM DID YOU HAVE SUCH DISCUSSIONS?

A. MARTY VOGEL.

Q. ANY OTHERS?

A. HE'S THE ONLY ONE I SPECIFICALLY REMEMBER.

Q. DO YOU REMEMBER WHEN THAT CONVERSATION OR CONVERSATIONS TOOK PLACE?

A. I BELIEVE IN THE SAME TIMEFRAME, FALL OF 1981.

Q. TELL ME WHAT YOU TOLD MR. VOGEL WITH REGARD TO HIS RESPONSIBILITIES AS TO THE RETAIL PRICE.

A. THAT, IF THERE WAS – THERE WAS ONE SPECIFIC CASE IN WHICH A RETAILER WAS SELLING BELOW RECOMMENDED LIST IN HIS TERRITORY; AND WE REQUESTED THAT MARTY FOLLOW UP ON THAT ACCOUNT AND FIND

[830]

OUT WHAT THE PROBLEM WAS AND TO RECTIFY IT.

Q. WAS THAT A CIRCUMSTANCE – DO YOU REMEMBER THE STATE IN WHICH THE RETAILER WAS UNDERCUTTING THE RETAIL PRICE?

A. NO, I DON'T.

Q. IF I SAID WEST VIRGINIA, WOULD THAT REFRESH YOUR RECOLLECTION?

A. I RECALL THAT THERE WAS A PROBLEM IN WEST VIRGINIA. I DON'T RECALL IF THAT ONE WAS SPECIFICALLY TIED TO MARTY VOGEL.

Q. THE PROBLEM THAT YOU RECALL IN WEST VIRGINIA, WAS THAT ALSO RELATED TO A RETAILER NOT SELLING AT THE, QUOTE, "RECOMMENDED," CLOSE QUOTE, LIST PRICE?

A. YES.

Q. DID YOU EVER HAVE A DISCUSSION WITH KENNETH B. LEIGHTON WHERE HE TOLD YOU WHAT, IF ANYTHING, HE DID, TO CONTROL RETAIL PRICES IN HIS TERRITORY?

A. YES.

Q. DO YOU REMEMBER WHEN – DID YOU HAVE MORE THAN ONE CONVERSATION WITH KENNETH B. LEIGHTON ON THAT SUBJECT?

A. NO.

Q. DO YOU REMEMBER WHEN THAT CONVERSATION OCCURRED?

A. I BELIEVE IT OCCURRED AFTER I STARTED WORKING FOR HIM, WHICH WOULD PUT IT IN EARLY SPRING OF 1983.

Q. WHAT DID HE TELL YOU WITH REGARD TO WHAT STEPS, IF ANY, HE TOOK TO SEE THAT HIS RETAILERS HELD THE PRICE?

A. HE WOULD SLOW DOWN SHIPMENTS.

[831]

Q. HE TOLD YOU THAT?

A. YES.

Q. HE SAID HE SLOWED SHIPMENTS AS A MEANS OF KEEPING THE RETAIL PRICES FIXED?

A. YES.

Q. DID MR. LEIGHTON EVER TELL YOU TO CONTACT A DISTRIBUTOR AS A RESULT OF THAT A RETAILER IN THAT DISTRIBUTOR'S TERRITORY WAS UNDERCUTTING THE RETAIL PRICE?

A. I AM SORRY, REPEAT THE QUESTION.

Q. DID MR. LEIGHTON, SR., EVER TELL YOU TO CONTRACT THE DISTRIBUTOR BECAUSE HE HAD LEARNED – "HE" BEING MR. LEIGHTON, SR. – HAD LEARNED THAT A RETAILER IN THAT DISTRIBUTOR'S TERRITORY WAS SELLING BELOW THE RETAIL PRICE?

A. THE ONE SPECIFIC CASE THAT HE TOLD ME TO FOLLOW UP WAS ON THE WEST VIRGINIA ISSUE.

Q. DID HE TELL YOU TO CONTACT THE DISTRIBUTOR THAT COVERED THE WEST VIRGINIA TERRITORY BECAUSE HE LEARNED THAT A RETAILER WAS SELLING BELOW THE RECOMMENDED PRICE?

A. YES.

Q. DO YOU REMEMBER WHO THE DISTRIBUTOR WAS AT THAT TIME THAT WAS COVERING THE TERRITORY?

A. I BELIEVE THAT IT WAS OHIO CUSHIONS AT THAT TIME.

Q. DO YOU REMEMBER THE NAME OF THE RETAILER THAT WAS CUTTING THE PRICE?

A. NO.

[832]

Q. DO YOU REMEMBER THE OTHER OCCASIONS WHERE THE FACT THAT A RETAILER WAS UNDERCUTTING THE SUGGESTED RETAIL PRICE CAUSED MR. LEIGHTON TO TELL YOU TO DO SOMETHING?

A. NO.

Q. ALL RIGHT. NOW, I WOULD LIKE TO MOVE YOUR ATTENTION, IF I MIGHT, TO A MEETING AT KENNETH B. LEIGHTON'S OFFICE, WHEREIN YOU WERE PRESENT, JOHN BURNE WAS PRESENT, AND KENNETH M. LEIGHTON WAS PRESENT, APPROXIMATELY A WEEK TO TEN DAYS BEFORE THE FEBRUARY DISTRIBUTORS' MEETING.

DO YOU HAVE THAT MEETING IN MIND?

A. YES.

Q. JUST TO SET THE CONTEXT, DO YOU REMEMBER THE DATE OR APPROXIMATE DATE THAT THAT MEETING OCCURRED?

A. APPROXIMATE DATE, LAST WEEK IN JANUARY.

Q. AS OF THIS MEETING, HAD JOHN BURNE'S APPOINTMENT AS THE NATIONAL MEDICAL DISTRIBUTOR ALREADY BEEN ANNOUNCED TO THE REGIONAL DISTRIBUTORS?

A. YES.

Q. AND THERE WAS A MEETING SCHEDULED AT THIS TIME IN CHICAGO, ON FEBRUARY 10, BETWEEN ALL THE DISTRIBUTORS, ALL THE REGIONAL DISTRIBUTORS, CORRECT?

A. YES.

Q. AND THIS MEETING OCCURRED WHERE? WAS IT AT – WHERE DID THE MEETING OCCUR?

A. WE HAD THE MEETING, I BELIEVE, IN – AT THE MC CORMICK INN,

[833]

WHICH IS THE HOTEL THAT THE MAJORITY OF US WERE STAYING IN AT THIS TIME.

Q. THAT'S THE FEBRUARY CHICAGO MEETING?

A. RIGHT.

Q. ALL RIGHT. NOW, I AM GOING BACK TO THE MEETING INVOLVING MR. BURNE, YOURSELF, AND KENNETH M. LEIGHTON, SR., AND KENNETH B. LEIGHTON.

WHERE DID THAT OCCUR?

A. THAT MEETING TOOK PLACE IN KEN B. LEIGHTON'S OFFICE.

Q. AGAIN, THAT WAS ABOUT A WEEK OR TEN DAYS BEFORE THE CHICAGO MEETING?

A. YES.

Q. DID YOU DISCUSS WITH KENNETH M. LEIGHTON, PRIOR TO THE MEETING, WHAT HIS PURPOSE WAS?

A. YES.

Q. WHAT WAS YOUR UNDERSTANDING OF ITS PURPOSE, BASED ON THAT CONVERSATION?

A. THE PURPOSE FOR THE MEETING – AND THE MEETING WAS PRIMARILY MOTIVATED AT THE REQUEST OF JOHN BURNE – WAS TO REEVALUATE OUR MARKETING APPROACH; AND WHAT WE MEAN BY THAT IS: WE HAD JUST ANNOUNCED A CENTRALIZED NATIONAL DISTRIBUTOR FOR THE MEDICAL MARKET; AND, ON THE OTHER SIDE, WE HAD FIVE REGIONAL DISTRIBUTORS SELLING SHOE INSERTS TO THE RETAIL MARKET. SO THERE WAS A LOT OF OVERLAP ON THAT. JOHN BURNE FELT THAT THAT WAS GOING TO BE A PROBLEM.

[834]

Q. DID MR. BURNE EXPRESS HIS VIEWS ON THAT SUBJECT TO YOU?

A. YES.

Q. DID HE SAY WHY HE FELT THAT IT WOULD BE A PROBLEM CONTINUING TO DEAL WITH FIVE REGIONAL DISTRIBUTORS?

A. IT WOULD BE A PROBLEM OF CONTROL FOR HIM AND – BECAUSE THE FIVE ORIGINAL DISTRIBUTORS WERE MARKETING TO RETAIL MEDICAL OUTLETS, THE SAME MARKET THAT JOHN BURNE WAS GOING TO BE APPROACHING.

Q. WAS JOHN BURNE'S PRICE TO HIS CUSTOMERS – STRIKE THE QUESTION.

WAS THE PRICE AT WHICH JOHN BURNE'S CUSTOMERS INTENDED TO SELL SORBOTHANE HIGHER THAN THE PRICE AT WHICH THE RETAIL CUSTOMERS WERE SELLING SORBOTHANE TO RETAIL ACCOUNTS OR RETAIL CONSUMERS?

A. YES.

MR. MAC ADAMS: OBJECTION. FOUNDATION, YOUR HONOR.

THE COURT: I WILL OVERRULE THE OBJECTION. THE ANSWER MAY STAND.

BY MR. SHOHET:

Q. WAS THERE ANY DISCUSSION ABOUT THE PRICE DIFFERENCE BETWEEN THE PRICE OF SORBOTHANE IN THE MEDICAL MARKET AND THE PRICE OF SORBOTHANE IN THE ATHLETIC MARKET AS A FACTOR CAUSING THE NEED FOR THIS MEETING?

A. YES.

Q. DID YOU HAVE SUCH DISCUSSIONS WITH JOHN BURNE CONCERNING

[835]

HOW THE PRICE DIFFERENTIAL AFFECTED THE NEED FOR CONTROL OF THE MARKET?

A. JOHN BURNE'S MARKETING APPROACH WAS THAT HE WAS SELLING THE SAME INSOLE THE OTHER FIVE DISTRIBUTORS WERE SELLING, PURCHASING THAT INSOLE FOR LESS THAN THE OTHER DISTRIBUTORS WERE PURCHASING IT FOR, AND THEN RESELLING IT FOR APPROXIMATELY TWICE AS MUCH AS WHAT THE SPORTING GOODS STORES WERE SELLING IT FOR. SO, IN ESSENCE, WHAT WAS HAPPENING WAS: A DOCTOR COULD GO DOWN TO A SPORTING GOODS STORE, BUY A PAIR OF INSOLES CHEAPER THAN GETTING IT FROM JOHN BURNE.

Q. AND DID MR. BURNE EXPRESS TO YOU OR ANYONE ELSE AT THE MEETING A DESIRE TO HAVE A SINGLE NATIONAL DISTRIBUTOR IN THE SPORTS MARKET?

A. THAT WAS JOHN BURNE'S DESIRE.

Q. DID HE SAY WHY HE WANTED A SINGLE NATIONAL DISTRIBUTOR IN THE SPORTS MARKET?

A. IT WOULD BE EASIER FOR HIM TO ENTER INTO AN AGREEMENT WITH ONE PERSON, PERHAPS ENTICE THAT PERSON TO ALSO RAISE THEIR PRICES, OR AT LEAST NOT INFRINGE ON HIS MARKET.

Q. NOW, WAS THERE A DISCUSSION AT THIS MEETING CONCERNING WHAT, IF ANYTHING, TO DO TO THE OTHER REGIONAL DISTRIBUTORS, THAT IS THE DISTRIBUTORS OTHER THAN KENNETH B. LEIGHTON?

A. YES.

Q. TELL ME WHO SAID WHAT ON THE SUBJECT OF WHAT TO DO ABOUT THE OTHER REGIONAL DISTRIBUTORS?

[836]

A. WELL, TO SET UP THE MEETING, THE MEETING WAS CALLED TO DISCUSS – BY JOHN BURNE TO DISCUSS HOW WE COULD REALIGN THE RETAIL MARKETING ON THE INSOLES OF THE FIVE DISTRIBUTORS TO A NATIONAL SYSTEM. THAT WAS THE POINT OF THE MEETING.

THE NEXT STEP WAS: HOW WOULD YOU DO THIS WITH THE FIVE DISTRIBUTORS? THE FIRST RECOMMENDATION FROM JOHN BURNE AND KEN LEIGHTON, SR., WAS SIMPLY THAT HE WOULD CANCEL THEM AND THEN NAME ONE NATIONAL DISTRIBUTOR.

Q. WAS THERE DISCUSSION ABOUT WHO THAT NATIONAL DISTRIBUTOR WOULD BE?

A. YES.

Q. AND WHO WAS – WHO WAS THE NATIONAL DISTRIBUTOR TO BE IN THOSE DISCUSSIONS?

A. KEN LEIGHTON, JR.

Q. DO YOU REMEMBER BOTH KENNETH M. LEIGHTON AND JOHN BURNE SUGGESTING THAT THE OTHER REGIONAL DISTRIBUTORS SIMPLY BE CANCELED?

A. YES.

Q. DID YOU SAY ANYTHING IN RESPONSE TO THE SUGGESTION IN OR ABOUT JANUARY OF 1982 CONCERNING THE CANCELLATION OF THE OTHER REGIONAL DISTRIBUTORS?

A. YES. MY CONCERN – AND I WAS AT THE MEETING, ALSO. MY CONCERN WAS THAT I FELT THAT WE HAD GIVEN A VERBAL COMMITMENT TO THESE FIVE DISTRIBUTORS AND HAD ENTERED INTO A RELATIONSHIP WITH THEM. I DID NOT UNDERSTAND HOW WE COULD CANCEL THESE

[837]

DISTRIBUTORS WITHOUT CAUSE; AND TO TAKE THAT ONE STEP FURTHER, IF WE DID CANCEL THE DISTRIBUTORS WITHOUT CAUSE, THAT THERE WOULD BE SOME LEGAL RAMIFICATIONS FOR THAT.

Q. FOLLOWING YOUR COMMENT IN THAT REGARD, WAS A SECOND ALTERNATIVE DISCUSSED CONCERNING HOW TO MAKE KENNETH B. LEIGHTON THE NATIONAL DISTRIBUTOR?

A. YES.

Q. WHAT WAS THE SECOND ALTERNATIVE?

A. THE SECOND ALTERNATIVE WAS TO CONVINCE R.H.R., SORBOTURF, TRIAD, ABSORBOTECH, THE FOUR OTHER DISTRIBUTORS, TO RECOGNIZE KEN AS A NATIONAL MANAGER IN THAT PARTICULAR MARKET, AND HE WOULD MANAGE THE BUSINESS FOR THESE FOUR OTHER DISTRIBUTORS. THEY WOULD MAINTAIN THEIR TERRITORIES, BUT THE BUSINESS DECISIONS ON HOW TO MARKET WOULD BE MANAGED BY KEN.

Q. WAS THERE SOME DISCUSSION AS TO JUST HOW YOU WOULD GO ABOUT CONVINCING THE OTHER REGIONAL DISTRIBUTORS THAT KENNETH B. LEIGHTON AND OHIO CUSHIONS WOULD BE THE NATIONAL LEADER OF THE MARKET?

A. YES.

Q. WHAT WAS DISCUSSED ON THAT SUBJECT AT THE MEETING?

A. THE REASON WE FELT THAT THIS MIGHT BE A VIABLE ALTERNATIVE IS THAT KEN DID HAVE THE STRONGEST BUSINESS SENSE OF THE FIVE DISTRIBUTORS, OR AT LEAST THAT WAS OUR PERSPECTIVE AT THE TIME; AND SO WE WANTED TO USE THAT ARGUMENT, THAT IT MAY BE BENEFICIAL FOR THEM TO RECOGNIZE THAT EXPERTISE AND TAKE ADVANTAGE OF

[838]

IT.

Q. DID KENNETH M. LEIGHTON, AT OR SHORTLY AFTER THIS MEETING, GIVE YOU DIRECTION TO ATTEMPT TO PORTRAY KENNETH B. LEIGHTON AND HIS COMPANY AS THE NATIONAL LEADER AMONG THE DISTRIBUTORS?

A. I WAS TOLD TO PURSUE THAT, YES.

THE COURT: DON'T LEAD IN THIS AREA, SIR. LET HER TESTIFY.

MR. SHOHET: ALL RIGHT.

BY MR. SHOHET:

Q. DID YOU HAVE SUCH A DISCUSSION WITH KENNETH M. LEIGHTON AT THE MEETING ITSELF?

A. THE MEETING RESOLVED THAT THAT WAS THE APPROACH WE WOULD TAKE AS OPPOSED TO CANCELING THE DISTRIBUTORS, AND THAT THIS APPROACH WOULD BE PRESENTED AT THE CHICAGO MEETING.

Q. FOLLOWING THE MEETING, WHAT, IF ANYTHING, DID YOU DO, IN OTHER WORDS, TO BE PREPARED TO PORTRAY KENNETH B. LEIGHTON AS A NATIONAL DISTRIBUTOR AT THE UPCOMING CHICAGO MEETING?

A. I PUT TOGETHER A SERIES OF STATISTICS, AS FAR AS SALES, CUSTOMERS, NUMBER OF OUTLETS, THAT TYPE OF THING, AS A COMPARISON CHART BETWEEN EACH DISTRIBUTOR.

Q. WOULD YOU TAKE A MOMENT NOW AND LOCATE EXHIBIT 441 IN YOUR BOOK?

IS EXHIBIT 441 A CHART THAT YOU PREPARED FOR PRESENTATION AT THE FEBRUARY, '82, SALES MEETING IN CHICAGO?

A. YES.

[839]

MR. SHOHET: I WOULD OFFER IT INTO EVIDENCE, YOUR HONOR.

THE COURT: IS THERE ANY OBJECTION?

MR. BOMSTER: NO OBJECTION, YOUR HONOR.

(PLAINTIFFS' EXHIBIT 441 RECEIVED.)

MR. SHOHET: MAY I PUBLISH IT TO THE JURY?

THE COURT: YES.

BY MR. SHOHET:

Q. FIRST OF ALL, DID YOU PREPARE EXHIBIT 441 FOLLOWING THE MEETING THAT WE HAVE JUST BEEN DISCUSSING, FOLLOWING THE MEETING AT KENNETH B. LEIGHTON'S OFFICE AND PRIOR TO THE CHICAGO SALES MEETING?

A. YES.

Q. WAS EXHIBIT 441 ACTUALLY PRESENTED AT THE CHICAGO MEETING AMONG ALL THE DISTRIBUTORS?

A. YES.

Q. ARE THE FIGURES FOR OHIO CUSHIONS FOR DECEMBER, 1981, CORRECT OR INCORRECT?

A. INCORRECT.

Q. DID YOU PREPARE EXHIBIT 441, INTENTIONALLY INSERTING AN INCORRECT FIGURE IN DECEMBER, 1981, FOR OHIO CUSHIONS' SALES FIGURES?

A. YES.

Q. IN WHAT SENSE IS THE DECEMBER, 1981, FIGURE INCORRECT? HOW IS IT INCORRECT?

[840]

A. THE FIGURE IS INFLATED.

Q. BY HOW MUCH IS IT INFLATED, OR HOW DID YOU COME UP WITH THAT FIGURE, IF YOU REMEMBER?

A. I TOOK THE ORDERS PLACED FOR JANUARY AND ROLLED THEM BACK INTO DECEMBER.

Q. DID YOU INCLUDE THE DECEMBER FIGURES AS WELL AS THE JANUARY FIGURES?

A. I ADDED DECEMBER AND JANUARY TOGETHER AND CREATED THAT AS THE DECEMBER FIGURE.

Q. WHY DID YOU DO THAT?

A. BECAUSE ORIGINALLY, IN ORDER TO SELL THE IDEA TO THESE DISTRIBUTORS THAT – ABOUT KEN'S EXPERTISE AND THE BENEFIT OF IT, WE TRIED TO HAVE A COMPARISON GRAPH. ON THAT COMPARISON GRAPH, AT THAT TIME, KEN'S PERFORMANCE WAS NOT – WAS GOOD, BUT NOT – WE DID NOT FEEL STRONG ENOUGH TO BE ABLE TO CONVINCE THEM THAT HE WAS THAT FAR AHEAD OF THEIR OWN BUSINESSES.

Q. WHOSE IDEA WAS IT TO FALSIFY THE SALES FIGURE FOR DECEMBER, 1981, FOR PRESENTATION AT THE MEETING IN CHICAGO?

A. KEN LEIGHTON, SR.

Q. IN ADDITION TO THIS DOCUMENT, DO YOU REMEMBER A GRAPH BEING CREATED FOR USE AT THE FEBRUARY SALES MEETING THAT DEPICTED THE VARIOUS SALES LEVELS OF THE REGIONAL DISTRIBUTORS?

A. YES.

Q. AND DID THAT GRAPH ALSO OVERSTATE KENNETH B. LEIGHTON AND OHIO CUSHIONS' PERFORMANCE FOR DECEMBER, 1981?

[841]

A. YES.

Q. DID THE ATTEMPT TO USE THE SALES FIGURES AS A MEANS OF PERSUADING THE OTHER REGIONAL DISTRIBUTORS TO RECOGNIZE OHIO CUSHIONS AS THE NATIONAL LEADER WORK?

A. NO.

Q. FOLLOWING THE – BY THE WAY, LET'S COVER THAT MEETING NOW.

THE MEETING THAT WE HAVE BEEN TALKING ABOUT WHERE THESE FIGURES WERE PRESENTED, THAT WAS A FEBRUARY 10, 1982, MEETING IN CHICAGO, RIGHT?

A. YES.

Q. WHO PAID FOR THE EXPENSES TO ATTEND THAT AMONG THE DISTRIBUTORS?

A. ALL OF THE DISTRIBUTORS PAID FOR THEIR OWN EXPENSES TO GET THERE, LODGING. THEY ALSO WERE ASKED TO CONTRIBUTE TO SOME OF THE COST OF THE SHOW.

Q. IN ADDITION TO PRESENTING THE SALES FIGURES THAT WE HAVE JUST BEEN TALKING ABOUT, WAS THERE ANY FURTHER DISCUSSION AT THE SALES MEETING CONCERNING THE PRICING REQUIREMENTS, SPECIFICALLY THE REQUIREMENT TO HOLD THE RESALE PRICE?

A. YES. THERE WAS A SPECIFIC DISCUSSION ABOUT MAINTAINING CONSISTENCY ON THE WHOLESALE PRICE.

Q. DO YOU REMEMBER ANY FURTHER DISCUSSION ABOUT THE NEED TO CONTROL THE RETAIL PRICE, AS WELL, AT THE MEETING?

A. NO.

Q. NOW, WAS JOHN BURNE ALSO PRESENT AT THIS SALES MEETING IN

[842]

CHICAGO?

A. YES.

Q. DID HE PARTICIPATE AT ALL, OR DID HE JUST SIT THERE?

A. HE DID NOT PARTICIPATE.

Q. NOW, FOLLOWING THE MEETING IN CHICAGO ON FEBRUARY 10, DID YOU REPORT BACK TO KENNETH M. LEIGHTON REGARDING YOUR OBSERVATION THAT IT WAS NOT GOING TO WORK – THAT IS, THE USE OF THESE SALES FIGURES WAS NOT GOING TO PERSUADE THE OTHER DISTRIBUTORS TO GIVE UP THEIR TERRITORIES TO KENNETH B. LEIGHTON OR RECOGNIZE HIM AS THE NATIONAL LEADER?

A. YES, I DID.

Q. FOLLOWING THAT CONVERSATION WITH KENNETH M. LEIGHTON, DO YOU RECALL HAVING DISCUSSIONS WITH HIM CONCERNING HOW TO – DISCUSSIONS, IF AT ALL, CONCERNING HOW TO DEAL WITH THE OTHER REGIONAL DISTRIBUTORS?

A. THERE WERE NUMEROUS DISCUSSIONS AFTER THAT POINT ABOUT THIS ISSUE.

Q. AND JUST TELL ME WHAT THE TOPIC OF THOSE DISCUSSIONS – WE'LL PICK THEM UP IN DETAIL AS WE GO, BUT WHAT WAS THE GENERAL TOPIC OF THE DISCUSSIONS THAT YOU HAD WITH KENNETH N. LEIGHTON AFTER YOU REPORTED THIS TO HIM?

A. THE PROBLEM WAS, SINCE WE WERE NOT SUCCESSFUL IN CONVINCING THE DISTRIBUTORS TO RECOGNIZE KEN, THEN WE WERE BACK TO THE FIRST RECOMMENDATION THAT HAD BEEN MADE AT THE LAST WEEK IN JANUARY, AT KEN LEIGHTON, JR.'S, OFFICE, TO CANCEL THE DISTRIB-

UTORS.

NOW, THE PROBLEM WITH THAT IS: THE DISTRIBUTORS WERE PERFORMING ADEQUATELY AT THIS TIME. I STILL MAINTAINED THAT YOU – THAT, EVEN THOUGH THERE IS NO CONTRACT, THERE WAS SOME TYPE OF VERBAL COMMITMENT TO THESE PEOPLE.

Q. DO YOU RECALL MORE THAN ONE CONVERSATION AFTER YOUR REPORT TO MR. LEIGHTON, SR., CONCERNING THE FEBRUARY MEETING ON THE SUBJECT OF WAYS TO GET RID OF THE OTHER DISTRIBUTORS?

A. THROUGHOUT THE COURSE OF 1982, YES.

Q. DO YOU REMEMBER HOW MANY CONVERSATIONS ON THE SUBJECT OF ELIMINATING OTHER DISTRIBUTORS YOU HAD WITH KENNETH M. LEIGHTON THROUGHOUT 1982 AND UP TO YOUR LEAVING SORBO, INC.?

A. I CAN'T RECALL THE EXACT NUMBER.

Q. I WOULD LIKE TO TURN FOR A MOMENT TO THE ADVERTISING BUDGETS THAT WERE SET FOR THE REGIONAL DISTRIBUTORS OTHER THAN THE TWO TRADE SHOWS.

OTHER THAN THE TRADE SHOWS THAT YOU HAVE IDENTIFIED, DO YOU REMEMBER HAMILTON KENT OR SORBO PAYING ANYTHING FOR THE NATIONAL ADVERTISING OF SORBOTHANE?

A. THEY WERE PAYING SOMETHING INTO THE NATIONAL AD BUDGET.

Q. TAKE A LOOK, IF YOU WOULD, FOR A MOMENT, AT EXHIBIT 442 IN THE BOOK.

HAVE YOU FOUND IT?

A. YES.

Q. CAN YOU IDENTIFY EXHIBIT 442?

Supreme Court, U.S.
FILED
MAY 8 1992
OFFICE OF THE CLERK

(8)

No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENTS SHIRLEY AND LARRY McQUILLAN

* Jeffrey M. Shohet
Marcelle E. Mihaila
Gray, Cary, Ames & Frye
401 B Street, Suite 1700
San Diego, CA 92101
(619) 699-2743
Counsel for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
I	INTRODUCTION	1
II	BACKGROUND	2
III	THE COURT SHOULD NOT LEAVE THE S.I. PETITION UNRESOLVED PENDING RESOLUTION ON THE MERITS OF THE *LESSIG* ISSUE RAISED BY THE SPECTRUM PETITION	4
IV	CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 3

Lessig v. Tidewater Oil Co., 327 F.2d 459, cert. denied, 377 U.S. 993 (1964) 1, 3, 4, 5

STATUTES

Sherman Act, § 1, 15 U.S.C. 1 .....1, 2, 3, 4

Sherman Act, § 2, 15 U.S.C. 2 .....1, 2, 3, 4

I

INTRODUCTION

This petition for certiorari (91-32 or the "S.I. petition") is one of two petitions arising out of this lawsuit. In the other petition (91-10 or the "Spectrum petition"), the Court on March 30, 1992 granted certiorari on a single issue, the so-called *Lessig* issue. It appears the Court intends to defer decision on the S.I. petition until it decides the Spectrum petition.

The purpose of this supplemental brief is to request that the Court decide the S.I. petition without awaiting resolution of the spectrum petition. Both petitions for certiorari raise, among other issues, an issue pertaining to *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964). However, the two petitions raise different *Lessig* issues. Moreover, *Lessig* applies only to claims arising under Section 2 of the Sherman Act. The S.I. petitioners, however, were adjudged liable for two Section 1 violations as well. Thus, even this Court's determination of the broadest possible *Lessig* issue in the Spectrum petition (i.e., the validity of the *Lessig* doctrine) would not be dispositive of respondents' antitrust claims against the S.I. petitioners.

This case has been in the legal system for eight years. Respondents' business was destroyed as a result of the wrongful acts of the petitioners and respondents have already waited four years since this case was tried to enforce their judgment. Since the resolution of the spectrum petition is not dispositive of respondents' Section 1 antitrust claims against the S.I. petitioners, further delay in consideration of the S.I. petition would appear to be unnecessary.

II

BACKGROUND

The two petitions for certiorari arise out of a jury verdict in favor of respondents. The jury found that Sorbothane, Inc., BTR, Inc., Hamilton-Kent Manufacturing Company and Kenneth Leighton, Sr., (the "S.I. petitioners") were liable for two separate violations of Section 1 of the Sherman Act – resale price maintenance and horizontal market allocation. The jury also found the S.I. petitioners – along with Spectrum Sports, Inc., and Kenneth Leighton, Jr. (the "Spectrum petitioners") – liable for monopolization, attempt to monopolize or conspiracy to monopolize under Section 2 of the Sherman Act. The jury also found the defendants liable on multiple claims under RICO and state law.[1] The jury awarded compensatory damages of $1,743,000 which the district court trebled. The district court awarded $912,033.50 in attorney's fees and costs and entered judgment in favor of respondents for $6,141,032.

Both the S.I. petitioners and Spectrum petitioners filed notices of appeal. On July 3, 1990, the Ninth Circuit Court of Appeals affirmed the judgment in an unpublished memorandum decision. (S.I. Petition For Cert. App. 3-31.) All petitioners then filed a petition for rehearing. On April 1, 1991, the Ninth Circuit modified

---

[1] The jury found the Spectrum petitioners liable for interference with prospective advantage and violations of California Unfair Competition law, but not for fraud, violations of the Cartwright Act, or section 1962(a) of RICO. Special Verdict Form II, VIII-IX, XIV-XVIII.

one sentence of its decision but otherwise denied the petition for rehearing. (S.I. Petition For Cert. App. 32-33.)

The S.I. petitioners and the Spectrum petitioners then filed separate petitions for certiorari. As their first "Question Presented," the Spectrum petitioners asked:

> "Whether a manufacturer's distributor *expressly absolved of violating Section 1 of the Sherman Act can,* without any evidence of market power or specific intent, be found liable for attempting to monopolize solely by virtue of a unique Ninth Circuit rule [the *Lessig* doctrine]?" [emphasis added] (Spectrum Petition For Cert., p. i.)[2]

The S.I. petitioners framed a different and far broader *Lessig* question:

> "Can a verdict of attempt to monopolize in violation of Section 2 of the Sherman Act be sustained when the jury has not been charged that it must find either specific intent or a dangerous probability of success?" (S.I. Petition for Cert., p. i)[3]

On March 30, 1992, the Court granted certiorari on the Spectrum petition limited to the *Lessig* issue. The Court apparently has conferenced at least twice on the

---

[2] The Spectrum petitioners also posed a question regarding whether a replaced distributor can be liable for treble damages "where the replacement was devoid of predatory conduct." (Spectrum Petition For Cert., p. i.)

[3] The S.I. petitioners also posed two other issues. One related to the application of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The other related to whether the jury should have been given an instruction on antitrust injury. (S.I. Petition, p. i.)

S.I. petition, but has neither granted nor denied certiorari. Thus, it appears the Court may have decided to leave the S.I. petition pending until it decides the merits of the *Lessig* issue in the Spectrum petition on which it granted certiorari.

III

THE COURT SHOULD NOT LEAVE THE S.I. PETITION UNRESOLVED PENDING RESOLUTION ON THE MERITS OF THE *LESSIG* ISSUE RAISED BY THE SPECTRUM PETITION

The interests of justice will not be served if the S.I. petition is left pending until the Court decides the merits of the *Lessig* issue posed by the spectrum petition. First, the two petitions pose very different *Lessig* issues. The issue on which the Court granted certiorari in the Spectrum petition focussed on the propriety of a *Lessig* instruction where the defendant is not found liable on any Section 1 claims. Unlike the Spectrum petitioners, however, the S.I. petitioners *were* found liable on two different Section 1 claims.

More significantly, even if the Court generally overrules, or otherwise limits the *Lessig* doctrine in deciding the Spectrum Petition, that determination of the *Lessig* issue will not be dispositive of all of respondents' antitrust claims against the S.I. petitioners. As noted above, the jury found the S.I. petitioners liable on two Section 1 claims. *Lessig* relates only to attempt to monopolize (a Section 2 claim) and has nothing to do with these Section 1 claims. Indeed, the United States as amicus curiae recognized this fact and stated:

> "The *Lessig* issue alone could make no difference to the outcome of the Sorbothane petitioners' case (No. 91-32) because they were found liable on two Section 1 counts." (Brief for the United States, p. 16.)

Elsewhere, the United States recognized:

> "And the resale price fixing verdict alone would suffice to support the entire award of damages – which was the only relief awarded." (Brief of the United States, p. 14, note 11.)

Thus, even if the Court completely overrules *Lessig* in the Spectrum Petition, it will not affect respondents' right to recover against the S.I. petitioners on the Section 1 claims – either of which supports the entire judgment.

The Court's resolution of the Spectrum petition unavoidably involves significant delay. Respondents, however, have limited financial resources and are severely delinquent in repaying Small Business Administration loans. This judgment is obviously of enormous significance to them. It creates an unnecessary hardship to respondents to delay resolution of the S.I. petition pending the Court's determination of the spectrum petition since that determination, whatever it is, is not dispositive of respondents' antitrust claims against the S.I. petitioners.

IV

CONCLUSION

Based on the above, respondents respectfully request that the Court decide the S.I. petition for certiorari without awaiting resolution of the spectrum petition.

Respectfully submitted,

JEFFREY M. SHOHET

May 8, 1992